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No. 82-729

IN THE

Supreme Court of the United States

October Term, 1982

DONALD T. REGAN, SECRETARY OF THE TREASURY, *Et Al.*,

Appellants,

v.

TIME INCORPORATED,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

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APPEAL DOCKETED OCTOBER 27, 1982
PROBABLE JURISDICTION NOTED FEBRUARY 22, 1983

TABLE OF CONTENTS

	Page
Relevant Docket Entries: *Time Incorporated v. Donald T. Regan, et al.*, United States District Court, Southern District of New York, 81 Civ. 3218 (VLB) ..	1
Complaint (filed May 27, 1981)	3
Exhibit A: Cover Illustration, TIME Magazine, December 14, 1970	13
Exhibit B: Page 43, TIME Magazine, July 29, 1974.	15
Exhibit C: Cover Illustration, TIME Magazine, February 23, 1976	17
Exhibit D: Cover Illustration, TIME Magazine, November 1, 1976.....	19
Exhibit E: Cover Illustration, FORTUNE Magazine, February 12, 1979	21
Exhibit F: Cover Illustration, SPORTS ILLUSTRATED Magazine, February 16, 1981	23
Affidavit of Frederick A. O. Schwarz, Jr., in support of plaintiff's motion for summary judgment (filed July 21, 1981)	25
Exhibit 1: Cover Illustration, TIME Magazine, September 10, 1965.....	37
Exhibit 2: Proposed Illustration for Page 145, FORTUNE Magazine, July 1977.....	39
Exhibit 3: Page 145, FORTUNE Magazine, July 1977	41
Exhibit 4: Cover Illustration, TIME Magazine, December 14, 1970 (same as Complaint Exhibit A)	43
Exhibit 5: Page 43 TIME Magazine, July 29, 1974 (same as Complaint Exhibit B).....	45
Exhibit 6: Cover Illustration, TIME Magazine, February 23, 1976 (same as Complaint Exhibit C).....	47

Page

Exhibit 7: Letter, David H. Martin, Legal Counsel, United States Secret Service, Department of the Treasury (*by* H. Terrence Samway, Assistant Legal Counsel) to TIME Magazine, February 24, 1976 49

Exhibit 8: Cover Illustration, TIME Magazine, November 1, 1976 (same as Complaint Exhibit D) 51

Exhibit 9: Letter, David H. Martin, Legal Counsel, United States Secret Service, Department of the Treasury (*by* Robert H. Rasor, Assistant Legal Counsel) to Walter S. Censor, Associate Counsel, Time Incorporated, November 18, 1976 53

Exhibit 10: Cover Illustration, FORTUNE Magazine, February 12, 1979 (same as Complaint Exhibit E) 55

Exhibit 11: Cover Illustration, SPORTS ILLUSTRATED Magazine, February 16, 1981 (same as Complaint Exhibit F) 57

Exhibit 12: Pamphlet: Department of the Treasury, United States Secret Service, "Use of Illustrations of Obligations and Securities of the United States and Foreign Governments" 59

Affidavit of Henry A. Grunwald, Editor-in-Chief of Time Incorporated, in support of plaintiff's motion for summary judgment (filed July 21, 1981) 71

Affidavit of Gilbert Rogin, Managing Editor of SPORTS ILLUSTRATED, in support of plaintiff's motion for summary judgment (filed July 21, 1981) ... 81

Affidavit of Ray C. Cave, Managing Editor of TIME Magazine, in support of plaintiff's moion for summary judgment (filed July 21, 1981) 87

Affidavit of Rudolph Hoglund, Art Director of TIME Magazine, in support of plaintiff's motion for summary judgment (filed July 21, 1981) 95

Page

Affidavit of Ronald N. Campbell, Art Director of FORTUNE Magazine, in support of plaintiff's motion for summary judgment (filed July 21, 1981) 101

Amended Answer (filed August 28, 1981) 105

Supplemental Affidavit of Frederick A. O. Schwarz, Jr. in support of plaintiff's motion for summary judgment (filed September 29, 1981) 109

Exhibit A: Transcript of Broadcast, "Ten O'Clock News", WNEW-TV, July 29, 1981, 10:00 p.m., New York, N.Y. 115

Opinion of the United States District Court, Southern District of New York (Broderick, J.) (filed June 4, 1982) 117

Order and Judgment of the United States District Court, Southern District of New York (Broderick, J.) (filed June 18, 1982) 155

Order of the Supreme Court of the United States noting probable jurisdiction (February 22, 1983) 157

RELEVANT DISTRICT COURT DOCKET ENTRIES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TIME INCORPORATED

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*

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81 Civ. 3218 (VLB)

May 27, 1981	Complaint filed, summons issued (summons served on all defendants May 29, 1981; filed June 1, 1981).
July 21, 1981	Plaintiff's Notice of Motion for Summary Judgment, *with* Plaintiff's Statement Pursuant to Civil Rule 3(g), Affidavit of Frederick A. O. Schwarz, Jr., Plaintiff's Memorandum of Law, and Affidavits of Editors and Art Directors of Time Incorporated in support of motion.
August 19, 1981	Answer filed.
August 28, 1981	Amended Answer filed.

September 11, 1981	Defendants' Notice of Motion for Summary Judgment, *with* Defendants' Rule 3(g) Statement and Response to Plaintiff's Rule 3(g) Statement, and Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendants' Cross-Motion for Summary Judgment.
September 29, 1981	Supplemental Memorandum in Support of Plaintiff's Motion for Summary Judgment, *with* Supplemental Affidavit of Frederick A. O. Schwarz, Jr. in support of motion.
October 15, 1981	Plaintiff's Response to Defendants' Statement Pursuant to Rule 3(g), *with* Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment.
June 4, 1982	Opinion (Broderick, J.): Plaintiff is entitled to judgment as a matter of law on its motion for summary judgment. Defendants' cross-motion for summary judgment is denied. A declaratory judgment to that effect shall be entered.
June 18, 1982	Order and Judgment (Broderick, J.).
July 16, 1982	Defendants' Notice of Appeal to the Supreme Court of the United States pursuant to 28 U.S.C. §1252.
March 1, 1983	Order of Supreme Court of the United States noting probable jurisdiction.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TIME INCORPORATED,
Plaintiff,

v.

DONALD T. REGAN, Secretary of the Treasury, H. STUART KNIGHT, Director, United States Secret Service, WILLIAM FRENCH SMITH, Attorney General of the United States, JAMES R. D'AMELIO, Special Agent in Charge, New York Field Office, United States Secret Service, JOHN S. MARTIN, JR., United States Attorney for the Southern District of New York,

Defendants.

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81 Civ. 3218 (VLB)

COMPLAINT

(filed May 27, 1981)

Plaintiff, for its Complaint herein, avers:

Jurisdiction

1. This is a civil action seeking declaratory and injunctive relief to vindicate and to safeguard rights of freedom of speech and of the press secured by the First Amendment of the United States Constitution. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1331 and the Constitution of the United

States. The amount in controversy, exclusive of interest and costs, exceeds $10,000. Declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202.

Parties

2. Plaintiff TIME INC. publishes periodical magazines called TIME, FORTUNE, SPORTS ILLUSTRATED, LIFE, MONEY, PEOPLE, and DISCOVER. The magazines FORTUNE and MONEY deal especially with matters pertaining to finance and the economy, and all of the magazines published by plaintiff report from time to time on the economy, financial issues, payments of money both legitimate and suspect, corporate and personal wealth, and other money-related matters. Plaintiff is incorporated under the laws of the State of New York and has its principal place of business at 1271 Avenue of the Americas, New York, New York.

3. Defendant DONALD T. REGAN, sued only in his official capacity, is Secretary of the United States Department of the Treasury. In that capacity he is reponsible for the administration of the Department, including its activities relating to the enforcement of the laws of the United States which define and provide for the punishment of counterfeiting and forgery of the currency.

4. Defendant H. STUART KNIGHT, sued only in his official capacity, is the Director of the United States Secret Service, a division of the Department of the Treasury. In that capacity he is responsible for the administration of the Secret Service, including the discharge of its authority to detect and arrest any person committing an act proscribed by the laws of the United States relating to the currency.

5. Defendant WILLIAM FRENCH SMITH, sued only in his official capacity, is the Attorney General of the United States. In that capacity he is responsible for the administration of the United States Department of Justice, including its activities relating to the enforcement of the penal laws of the United States.

6. Defendant JAMES R. D'AMELIO, sued only in his official capacity, is Special Agent in Charge of the New York Field Office of the United States Secret Service.

7. Defendant JOHN S. MARTIN, JR., sued only in his official capacity, is the United States Attorney for the Southern District of New York.

The Uses of Currency Illustrations in the Communication of News and Ideas

8. In the editorial judgment of the editors and art directors of plaintiff TIME INC., there is often no simpler or more effective means of conveying information, opinions and ideas concerning a wide range of issues of vital public interest, or of commenting upon events, than through the use of photographs and artwork which depict illustrations of currency. Freedom to use such illustrations is important to the journalists responsible for the selection and preparation of the editorial content of plaintiff's magazines.

9. Within the past decade, plaintiff's magazines have utilized photographs and artwork depicting illustrations of currency, *inter alia*, to symbolize the toll of inflation, to represent the economic issues at stake in an election for the President of the United States, to comment upon political scandals, and to convey information or commentary upon matters ranging from the place of the American dollar in international commercial markets to point-shaving scandals in amateur basketball. Recent uses of currency illustrations in plaintiff's magazines include, but are not limited to, the following examples, each of which by definition appeared on one side of a page only:

(a) A photographic reproduction in color of approximately one-quarter of the face of a $1 Federal Reserve Note, photographically enlarged to approximately five times actual size and obscured in substantial part by printed legends. This reproduction appeared on the cover

of the December 14, 1970, issue of TIME, and illustrated a story about inflation appearing at pp. 82-90 in that issue of the magazine. A copy of that cover is attached to this Complaint as Exhibit A.

(b) A photographic reproduction in black and white of approximately one-half of the face of a $1 Federal Reserve Note, substantially obscured by an overlaid picture of a life preserver. This reproduction appeared on page 43 of the July 29, 1974, issue of TIME, and illustrated an accompanying essay captioned, "How to Mobilize Against Inflation". A copy of that page is attached to this Complaint as Exhibit B.

(c) A photographic reproduction in black and white of a $1000 Federal Reserve Note, substantially obscured by an overlaid printed legend and by an overlaid graphic design. This reproduction appeared on the cover of the February 23, 1976, issue of TIME, and illustrated a story appearing at pp. 28-36 in that issue of the magazine about alleged international bribery by an American aircraft firm. A copy of that cover is attached to this Complaint as Exhibit C.

(d) A photographic reproduction in color of $1, $10 and $20 Federal Reserve Notes clutched in a human hand. The Notes shown were folded lengthwise, and photographically reduced to a scale less than one-half actual size. With respect to most of the photographed Notes, only a part of an outside border, or the border and a fragment of a single numeral, were visible. With respect to a single $10 Note, two larger portions were visible, but none equal to as much as one inch square. This reproduction appeared on the cover of the November 1, 1976, issue of TIME above the legend "Voting Your Pocketbook", and illustrated a story appearing at pp. 18-22 in that issue of the magazine about an impending election of the President of the United States. A copy of that cover is attached to this Complaint as Exhibit D.

(e) A photographic reproduction in color of Federal Reserve Notes enclosed within a money clip. The Notes shown were folded twice widthwise, and photographically enlarged to more than twice their actual size. With respect to most of the photographed Notes, only fragments of an outside border were visible. With respect to a single $1000 Note, approximately one-third of the reverse side was visible, substantially obscured by the overlaid money clip. This reproduction appeared on the cover of the February 12, 1979, issue of FORTUNE, and illustrated a story on "America's Invisible Rich" appearing at pp. 92-104 of that issue of the magazine. A copy of that cover is attached to this Complaint as Exhibit E.

(f) A photographic reproduction in color of $100 Federal Reserve Notes stuffed inside or descending into a basketball hoop and attached net. The Notes shown were photographically reduced to a scale approximately one-third actual size, and each was visible only in part; most were substantially obscured by overlaid portions of other Notes in the photograph, by the basketball hoop or net, or by an overlaid printed legend. This reproduction appeared on the cover of the February 16, 1981, issue of SPORTS ILLUSTRATED beneath the caption, "Anatomy of a Scandal", and illustrated a story appearing at pp. 14-21 in that issue of the magazine about a "point-shaving" scheme in amateur basketball. A copy of that cover is attached to this Complaint as Exhibit F.

The Prohibition of Currency Illustration Under Federal Law

10. Chapter 25 of Title 18 of the United States Code is a penal statute intended to prevent and to provide for the punishment of alteration, counterfeiting or forgery of the coins, obligations, securities and other official documents of the United States Government and of foreign governments. Title 18, U.S.C. § 474, one of thirty-nine sections in that statute, is captioned "Plates or stones for counterfeiting obligations or

securities". Paragraphs 1st through 5th and paragraph 7th of § 474 prohibit unauthorized possession, use, importation, sale and forgery of materials which can actually be employed for counterfeiting purposes, such as plates, stones and paper used for the printing of United States obligations. However, paragraph 6th of § 474 provides:

> "Whoever prints, photographs, or in any other manner makes or executes any engraving, photograph, print, or impression in the likeness of any such obligation or other security [of the United States], or any part thereof, or sells any such engraving, photograph, print, or impression, except to the United States, or brings into the United States, any such engraving, photograph, print, or impression, except by direction of some proper officer of the United States; . . .
>
> "Shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both."

11. On its face and as interpreted by defendants, paragraph 6th of Title 18, U.S.C. § 474 absolutely prohibits the printing or publication for any purpose of any photograph, print or other impression in the likeness of any portion of any specimen of United States currency. On its face and as interpreted by defendants, the prohibition of § 474 ¶ 6 applies whether a likeness of currency is good or bad; whether or not it is susceptible of being confused for genuine currency; and whether or not it is capable of being used in any manner in a counterfeiting or forgery scheme, however fanciful or improbable. On its face and as interpreted by defendants, the prohibition of § 474 ¶ 6 applies whether the likeness is true to the actual size of currency, or substantially enlarged or reduced; whether it is faithful to the true color and appearance of currency, or substantially discolored or recolored, distorted, obscured, or modified; whether it depicts a substantial fraction of any specimen of currency, or but the smallest fragment thereof; and whether it is printed or impressed upon a substance which resembles the appearance and consistency of United States currency, or upon any other substance, be it tissue

paper, glossy paper, or eggshell. On its face and as interpreted by defendants, the prohibition of § 474 ¶ 6 applies even if a likeness of currency appears on only one side of a page. On its face and as interpreted by defendants, the prohibition of § 474 ¶ 6 applies whether a likeness of currency is executed for artistic purposes, for the expression of political or economic opinion, for the communication of information and ideas, or for the purpose of counterfeiting or forgery.

12. On its face and as interpreted by defendants, Title 18, U.S.C. § 474 ¶ 6 absolutely prohibits plaintiff from conveying information, opinions or ideas to its readers, or commenting upon public affairs, through the use of any photographs or artwork in the likeness of any portion of any specimen of United States currency. For the violation of this prohibition plaintiff's publisher and editors risk arrest and prosecution, and plaintiff risks forfeiture of all copies of a publication in which such an illustration appears, as well as forfeiture of all material and apparatus used or fitted or intended to be used in the making of such an illustration.

13. Title 18, U.S.C. § 504 carves out from the proscriptions of § 474 ¶ 6 an exemption for the printing or publishing of illustrations of United States currency which (a) are in black and white; (b) are of a size less than three-fourths or more than one and one-half, in linear dimension, of each part of any matter so illustrated; (c) appear in articles, books, journals, newspapers or albums; and (d) are for ". . . numismatic, educational, historical, or newsworthy purposes." The printing or publication of any likeness of currency which fails to satisfy all of these requirements is barred by § 474 ¶ 6.

14. The definitions of "illustrations" and of "numismatic, educational, historical, or newsworthy purposes" within the meaning of § 504 are not set forth in that provision or any other provision of Title 18, U.S.C. The exposure of plaintiff and others to the risk of the sanctions described in ¶ 12 above therefore turns upon the personal judgments of defendants and their agents and employees as to the nature and purposes of the illustrations that should be deemed to satisfy the statutory

standard. In addition, defendants' construction of the statute to date substantially extends the sweep of its prohibitions. Thus, as of the date of this Complaint, agents and employees of defendants REGAN, KNIGHT and D'AMELIO have advised plaintiff that in the opinion of the Department of the Treasury, § 504 prohibits illustrations "used primarily for decorative or eye-catching purposes", and also requires that an illustration otherwise permitted by that section "be accompanied by numismatic, educational, historical or newsworthy information *relating directly to the item that is illustrated.*" (emphasis supplied)

15. With respect to each of the currency illustrations in plaintiff's magazines specifically described in subparagraphs (a) through (f) of ¶ 9 above and attached hereto, and with respect to other, similar photographs and artwork not here specifically described, plaintiff was advised by agents or employees of defendants KNIGHT and D'AMELIO, or of their predecessors, that in the opinion of the Department of the Treasury, the illustration failed to satisfy the requirements for the exemption conferred by Title 18, U.S.C. § 504, and therefore violated Title 18, § 474. Plaintiff has been repeatedly warned to cease and desist from further use of photographs and artwork in its magazines depicting likenesses of currency except as provided by the terms of § 504, and threatened with prosecution if it fails to do so.

Causes of Action

16. Title 18, U.S.C. § 474 ¶ 6 on its face violates the First Amendment of the United States Constitution in that it is unconstitutionally overbroad. Section 474 ¶ 6 broadly and indiscriminately sweeps within its prohibitions constitutionally protected rights of freedom of speech and of the press, and abridges and chills the exercise of protected speech by plaintiff and others.

17. On their face and as applied, Title 18, U.S.C. § 474 ¶ 6 and § 504 violate the First Amendment of the United States

Constitution, in that (a) they absolutely prohibit speech which poses no danger to the realization of the governmental interest in prevention of counterfeiting and forgery of the currency; and (b) are not drawn with narrow specificity to further the governmental interest in prevention of counterfeiting and forgery of the currency by means that directly advance their legitimate ends, and avoid unnecessary intrusion upon constitutionally secured freedoms of speech and of the press.

18. On its face and as applied, Title 18, U.S.C. § 504 violates the First Amendment of the United States Constitution, in that it purports to distinguish lawful from unlawful speech on the basis of a judgment by the Government as to the nature and content of speech which serves ". . . educational, historical or newsworthy purposes". The statute is unconstitutionally vague; unconstitutionally abridges the right of editors and publishers to exercise editorial control and judgment over the content of the material in their publications; and unconstitutionally regulates speech on the basis of its content pursuant to a test of lawfulness that is not related, remotely or at all, to any compelling governmental interest.

19. Plaintiff has no adequate remedy at law.

Prayer for Relief

WHEREFORE plaintiff respectfully prays judgment against defendants as follows:

(a) declaring that Title 18, U.S.C. § 474 ¶ 6 and § 504 are null and void on their face and as applied to plaintiff;

(b) restraining and enjoining defendants, their successors, their agents and all persons subject to their direction and control, from in any way enforcing or threatening to enforce said statutes; and

(c) such other and further relief as this Court may deem just and proper.

May 27, 1981

CRAVATH, SWAINE & MOORE

by /s/ FREDERICK A. O. SCHWARZ, JR.

Frederick A. O. Schwarz, Jr.
A member of the firm

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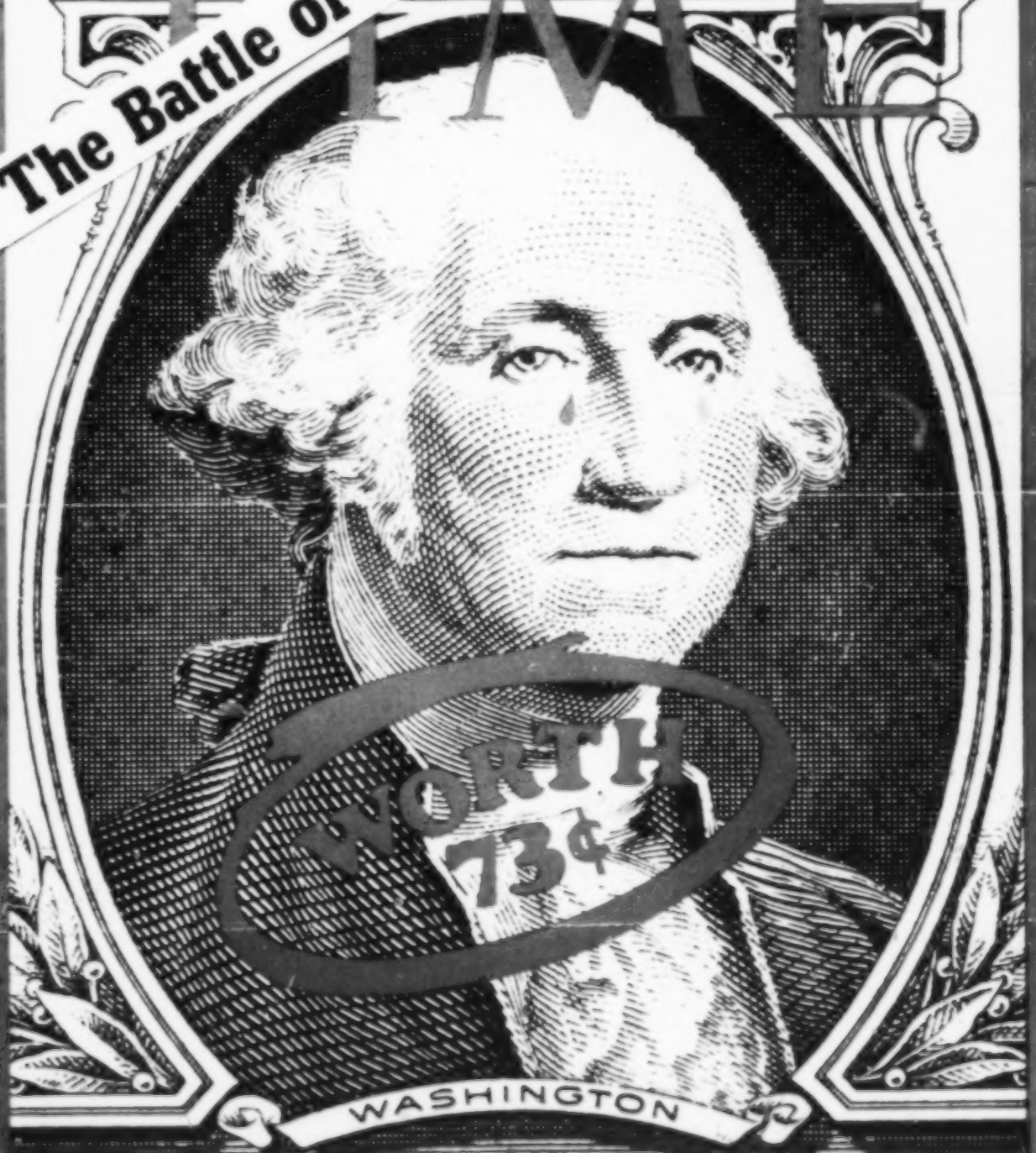
New York, New York 10005
(212) 422-3000

[Affidavit of Service omitted in printing.]

FIFTY CENTS DECEMBER 14, 1970

TIME

The Battle of the Buck



How to Mobilize Against Inflation

Inflation may be becoming to the 1970s what depression was to the 1930s—not only an economic agony but a crisis that threatens the stability of society. Like the Great Depression four decades ago, today's Great Inflation has struck a blow at Americans' usual optimism about the future and replaced it with a deep worry—about whether families will be able to afford travel, comfortable housing, quality education for their children, even the foods they like best.

Millions of people justifiably feel that the economy is cheating them of the rewards of hard work and thrift. A few more years of skyrocketing prices that wipe out much of the middle class and reduce some Americans to eating dog food could well cause many voters to question whether a system so fundamentally flawed can endure.

The public demoralization is being vastly increased by a gnawing fear that no one knows how to stop inflation in a modern democratic capitalist economy. The Government swings erratically from price controls to a free market, from budget stimulation to budget cutting, from easy money to tight money; nothing seems to work for long. Economists discussing anti-inflation strategy have rarely been so modest and tentative; several seem confident only in proclaiming that their colleagues' ideas will not work.

Modesty is advisable: inflation is in fact the most torturingly complex problem of modern economics. It seems inextricably bound up with growth and high employment; a quick and sure solution might be achieved by inducing another depression—but that would be too severe a cure. Moreover, inflation has become a worldwide plague (TIME cover, April 8). The U.S., even if it can control the economic sickness within its own borders, might be subject to reinfection from abroad.

But if no quick, final cure is in sight, the Government still has an obligation to act. The economy, to be sure, is not completely manageable by Washington, but there are a number of policy actions that could be taken to greatly reduce inflation's severity. And in dealing with inflation, degree is crucial; the difference between price increases at annual rates of, say, 6% and 12% is the difference between excessive social drinking and incapacitating alcoholism.

The steps are slow-working and painful. Worse, they sound like a prescription for ensuring the defeat of any President who tries them, since they amount to taking on every vested interest in the economy at once. So there will be a strong temptation to avoid them and hope that a recent downturn in inflation—from an annual rate of 12.3% in the first quarter to 8.8% in the second—continues on its own. But that improvement is scarcely satisfactory; the Government must do all it can to bring the rate down further.

The first essential is to hold down federal spending and reduce the rate of increase in the U.S. money supply. That classic remedy for inflation has been advocated so often that Administration officials refer to it as "the old-time religion." It means slow growth, sluggish profits, increasing unemployment. So it is not surprising that the old-time religion has been more often preached than followed.

Right now, the Federal Reserve Board is acting the role of zealous convert. In 1972 and early 1973 it pumped out enough money to overstimulate a booming economy; money supply in the last quarter of 1972 grew at a startling annual rate of 8.4%. Lately the board has held the increase to a rate of about 6%, a growth much slower than the explosive—and inflationary—surge in demand for business loans. Interest rates have consequently gone into orbit. But as Alan Greenspan, who is Nixon's choice to become head of the Council of Economic Advisers, has pointed out, that policy has been pushed close to the point at which it will self-destruct. Savings and loan associations and savings banks cannot effectively compete with commercial banks for funds in the tight money market, and some may soon teeter on the edge of collapse. If so, the Federal Reserve would have to come to their rescue as "lender of last resort"—and that would mean another massive, inflationary increase in the money supply. The Federal Reserve, in other words, cannot fight inflation all by itself; it needs help from Administration budget makers—who, while preaching fiscal conservatism, have run up a cumulative deficit of $68 billion in five years.

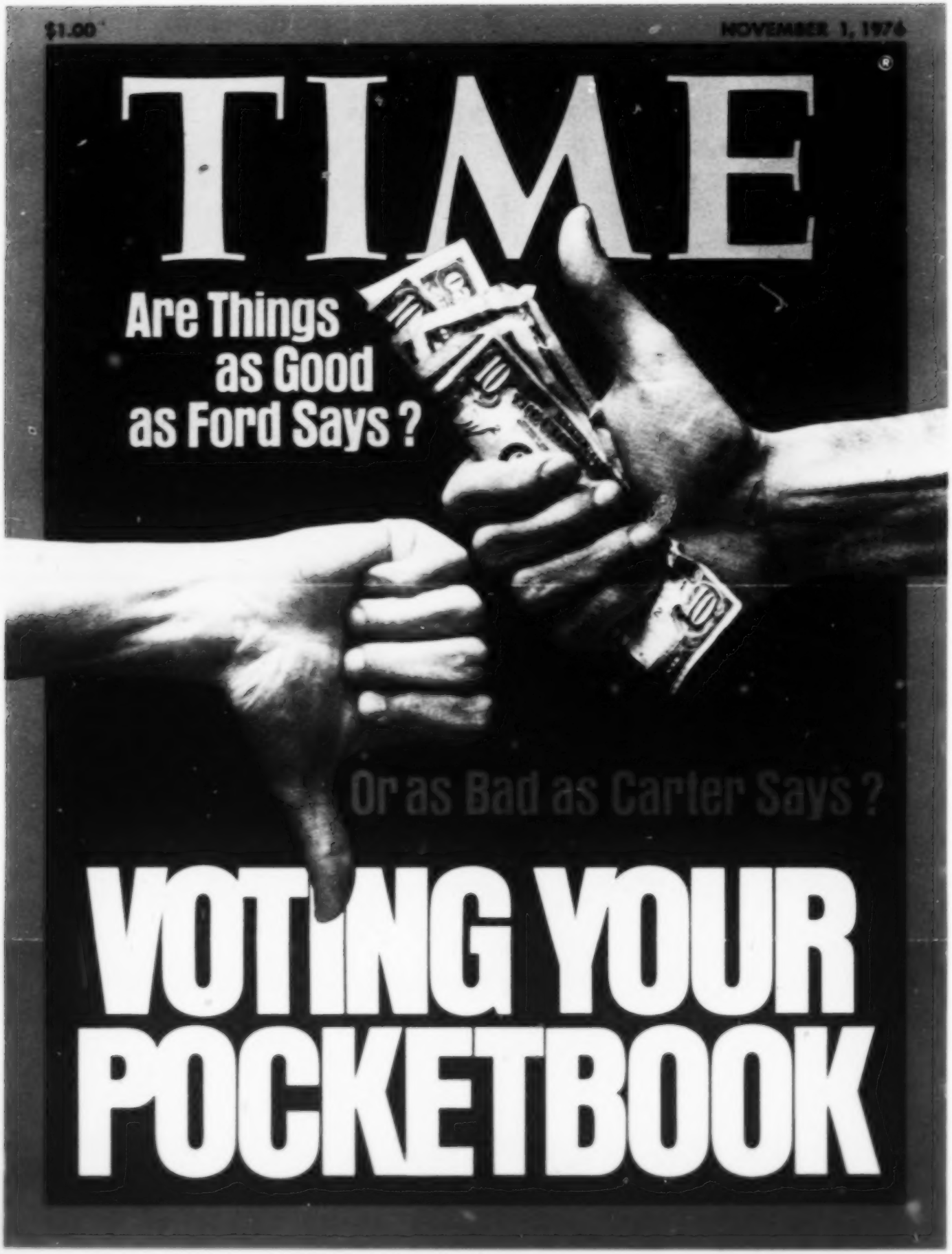
Federal Reserve Chairman Arthur Burns called last week for a $10 billion cut in Government spending for fiscal 1975, which is budgeted at $305 billion, *v.* $270 billion in the last fiscal year. President Nixon himself has said that expenditures should be held to $300 billion, at which point they might just be balanced by growing revenues, but he has postponed the hard decisions about where to cut. Small wonder. The choice will have to be made from a herd of sacred cows: military spending, veterans' benefits, revenue-sharing aid to states and cities.

The size and specifics of any cut in this year's budget are less important than that the Administration, the Federal Reserve and Congress all determine to apply fiscal-monetary restraint for as long as is necessary. The policy need not be pressed hard enough to cause a recession. Rather, the strategy should be to permit some real growth, but keep the budget and monetary brakes on hard enough to hold total demand for several years slightly below the economy's capacity to increase the output of goods and services, until the inflationary momentum at last subsides.

Such a hold-down would set up severe strains in the economy, which the Government must be prepared to ease. For one thing, credit would remain scarce and costly, especially for small businessmen and home buyers. To prevent big corporations from gobbling up all the loan money, the Government would have to nag bankers to turn down some loans and perhaps institute credit controls if they refused.

A long-term program of holding down demand would mean that for years the nation could not reduce the jobless rate to the 4% "full employment" level; unemployment might well rise beyond the present 5.2%. The unemployed, of course,

TIME
THE BIG PAYOFF
Lockheed Scandal:
Graft Around the Globe


$1.00
NOVEMBER 1, 1976
TIME
Are Things as Good as Ford Says?
Or as Bad as Carter Says?
VOTING YOUR POCKETBOOK

FORTUNE

$2.00 February 12, 1979

AMERICA'S INVISIBLE RICH

Taiwan's Future

The Nightmare of Natural-Gas Decontrol

Cadillac's Super-Salesman

Sports Illustrated
FEBRUARY 16, 1981 $1.50

ANATOMY OF A SCANDAL

The Mastermind's
Inside Story of the Boston College
Point-Shaving Scheme

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TIME INCORPORATED,

Plaintiff,

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, *Et Al.,*

Defendants.

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81 Civ. 3218 (VLB)

AFFIDAVIT OF FREDERICK A. O. SCHWARZ, JR.

(filed July 21, 1981)

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

FREDERICK A. O. SCHWARZ, JR., being duly sworn, deposes and says:

1. I am a member of the firm of Cravath, Swaine & Moore, attorneys for plaintiff herein. For a number of years, plaintiff Time Inc. ("Time") has consulted me and my firm concerning the controversy with the Secret Service and the Department of the Treasury involved in the instant action.

Summary

2. I submit this affidavit in support of plaintiff's motion for summary judgment

(a) to set forth the historical facts as to the complaints and warnings plaintiff has received from agents and employees of defendants, or of their predecessors, with respect to Time's use of photographs and artwork depicting illustrations of United States currency—partial, distorted and doctored illustrations not remotely susceptible of use for any purpose relating to counterfeiting, but important, in the judgment of plaintiff's editors, to the effective reporting of the news; and

(b) to indicate how Title 18, U.S.C. § 474 ¶ 6 and § 504 have been construed and applied by the Department of the Treasury and the Secret Service, in relation to photographs and artwork published or intended to be published by Time—*i.e.*, to prohibit speech which poses no risk to the realization of the government's interest in the prevention of counterfeiting; and to regulate such speech as the government allows based upon criteria which bear no relation to fulfillment of that interest, but arrogate to the government authority to determine the content of "newsworthy" material for the press.

The following five paragraphs briefly summarize the substance of Time's communications from the Secret Service, with cross-references to the material set forth in greater detail below, and describe the announcements, accusations and demands from the Service in May 1981 which immediately preceded the filing of this lawsuit.

3. Over the past several years, members of Time's legal and production departments have been advised by agents and employees of the Secret Service on numerous occasions that in the opinion of the Department of the Treasury, photographs and artwork appearing in Time's magazines violated the prohibitions of Title 18, U.S.C. respecting the printing or publication of likenesses of United States currency, and that Time must

cease and desist from further violations. (See ¶¶ 10-16, *infra.*) In addition, on several occasions when the legal or production departments of Time sought the views of the Secret Service as to the lawfulness of photographs or artwork intended to be used in future issues of Time's magazines, they were advised that the intended illustrations would violate the statutory prohibitions and could not be used. (See ¶¶ 8 and 9, *infra.*) Copies of the actual and proposed illustrations challenged by the Secret Service are annexed as Exhibits hereto. As is evident from the face of these pictures, none could possibly serve as instruments of counterfeiting.

4. In the course of the communications between Time and the Secret Service, different agents and employees of the Secret Service have expressed on behalf of the Department of the Treasury varying views as to the scope of the prohibition set forth in Title 18, U.S.C. § 474 ¶ 6 and the partial exemption provided in Title 18, U.S.C. § 504.

(a) On several occasions, Time has been instructed that no color likeness of any portion of a specimen of currency may be published, regardless of the size or medium of the illustration, but that black and white likenesses are permissible so long as they conform to the requirements as to size set forth in Title 18, U.S.C. § 504 and appear in a publication for one of the purposes approved by the statute. (See ¶¶ 8, 11, 12, 14 and 15, *infra.*)

(b) On at least one occasion, however, Time was instructed that in the opinion of the Department of the Treasury, no photograph of any portion of a specimen of currency may be published, regardless of its color or size, because a photograph is not an "illustration" within the meaning of § 504. (See ¶ 9, *infra.*)

(c) On other occasions, moreover, Time has been advised that in the opinion of the Department of the Treasury, no illustration of any portion of a specimen of currency may be published, regardless of its color or size or the medium of illustration, unless accompanied by "numismatic, educational,

historical or newsworthy" information specifically concerning the particular Federal Reserve Note illustrated. (See ¶¶ 13 and 17, *infra.*) This construction of § 504—which bars *all* symbolic depictions of currency for *any* purpose, including, *e.g.*, a black and white broad-brush likeness of a crumpled and shrunken $5 bill, intended graphically to express the toll of inflation—appears to be the current official interpretation of the Department of the Treasury, as set forth in a publication received by a member of Time's Legal Department from an agent of the Secret Service on May 21, 1981, six days before this action was filed. (See ¶ 17, *infra*, and Ex. 12.)

5. At no time has any agent or employee of the Department of the Treasury or the Secret Service ever intimated to Time that the scope of the prohibition upon publication of illustrations of currency might relate in any manner to the likelihood that a given illustration might actually be used in some fashion in a scheme for counterfeiting or forgery.

6. On May 19, 1981, Time reported to me that an agent of defendant D'Amelio had once again complained that a photograph appearing in one of plaintiff's publications—the cover of the February 16, 1981, issue of SPORTS ILLUSTRATED magazine—violated Federal penal laws. The photograph in question illustrated a story in that issue of the magazine about corruption in college basketball, and pictured portions of scores of $100 Federal Reserve Notes, photographically reduced in size, stuffed inside a basketball hoop and net.[1] Time was further advised by defendant D'Amelio's agent (i) that the Secret Service intended to seize all plates and other materials involved in the production of the SPORTS ILLUSTRATED cover; (ii) that the names and addresses of all persons involved in the

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[1] Copies of the photograph which provoked this announcement and the succeeding series of demands from the Service are annexed to the complaint herein as Exhibit F, and to this affidavit as Exhibit 11. The details of the communciations between plaintiff and the Secret Service relating to the SPORTS ILLUSTRATED cover are set forth at ¶¶ 16-17, *infra*, and the background of the decision to use that cover is discussed in the accompanying Affidavit of SPORTS ILLUSTRATED's Managing Editor, Gilbert Rogin, at ¶¶ 3-6.

preparation of the SPORTS ILLUSTRATED cover must be delivered to the Secret Service; and (iii) that the agent wished to "interview" a member of plaintiff's management in the presence of counsel.

7. In view of the increasing importance of the photographs and artwork for which the Secret Service routinely berates plaintiff, and the increasing jeopardy to plaintiff's editors and art directors from the ongoing pattern of harassment and complaints, I advised Time to commence this lawsuit, to clarify the fact that defendants cannot constitutionally interfere with the editorial judgments of plaintiff's editors as to the design or content of published material which creates no danger to the fulfillment of any legitimate governmental interest.

Illustrations Barred by the Secret Service

8. The cover of the September 10, 1965, issue of TIME magazine illustrated a story appearing at pp. 84-88 of that issue about a forthcoming conference on international monetary policy, and featured a painted portrait of Henry Fowler, then Secretary of the Treasury. The managing editor and art director of TIME intended to use for the background of Secretary Fowler's portrait a color painting of a furled $10 Federal Reserve Note on which the portrait of Alexander Hamilton, the legend, "United States of America", and the arabic number "10" would have been visible. When Time sought the views of the Secret Service as to the lawfulness of the intended background painting, it was advised by E. A. Wildy, then Assistant Chief of the Secret Service, that in the opinion of the Department of the Treasury, a painted color presentation of a portion of a specimen of currency such as that which TIME intended to use is prohibited by Title 18, U.S.C. § 474 if it so much as "resembles" a part of a genuine Federal Reserve Note. A copy of the cover actually used for that issue of TIME—which includes, in the background of Secretary Fowler's portrait, a black-and-white artist's rendering of a $10 Note that apparently satisfies Federal law, but in fact bears a closer

likeness to a genuine Note than the illustration that was banned—is annexed hereto as Exhibit 1.

9. The July 1977, issue of FORTUNE contained at pp. 144-154 an article dealing with the financial circumstances of the K-Mart Corporation, a "cash-rich" enterprise confronted by the need to make wise investment decisions in order to maintain its record of earnings. To illustrate that article, which was entitled "K Mart Has To Open Some New Doors on the Future", the managing editor and art director of FORTUNE intended to use a color photograph depicting portions of three $100 Federal Reserve Notes as a "landscape" of financial resources set beneath a series of open doorways in the sky. Each of the Notes in the intended illustration was significantly enlarged, shown only in part, and distorted photographically in color, shape and size. When the legal department of Time sought the views of the Secret Service as to the lawfulness of the intended illustration, it was advised by Robert H. Rasor, then Assistant Legal Counsel to the Director of the Secret Service, that in the opinion of the Department of the Treasury, use of the illustration was prohibited by Title 18 on two separate grounds, in that (i) it included a color reproduction of portions of specimens of currency, and (ii) it was a photograph, and Title 18, U.S.C. § 504 creates an exception for "illustrations" only. A copy of the photograph intended to be used in the July 1977 issue of FORTUNE is annexed hereto as Exhibit 2. A copy of the photograph used instead is annexed hereto as Exhibit 3. In the editorial judgment of FORTUNE's Art Director, the photograph actually printed was not nearly as effective in communicating the thought intended to be conveyed as the illustration banned by the Secret Service. (See Affidavit of Ronald N. Campbell ("Campbell Aff."), ¶ 6.)

Complaints and Warnings from the Secret Service

10. Between December 1970 and May 1981, plaintiff's magazines utilized photographs and artwork depicting illustrations of currency to report information and commentary on

matters ranging from an election of the President of the United States to corruption in amateur sports. On at least six occasions during that period, plaintiff was informed by agents of the Secret Service that in the opinion of the Department of the Treasury, these photographs and artwork failed to satisfy the requirements of Title 18, U.S.C. § 504, and therefore violated Title 18, U.S.C. § 474. In each of the illustrations about which the Service complained, the Federal Reserve Notes pictured were shown only in part, dramatically enlarged or reduced in size, distorted in appearance, and/or substantially obscured by printed legends or overlaid graphic designs. By definition, each appeared on only one side of a page, and that page was of the glossy paper used in the production of plaintiff's magazines.

11. The cover of the December 14, 1970, issue of TIME illustrated a story on inflation appearing at pp. 82-90 of that issue captioned "The Battle of the Buck", and featured a dramatically enlarged photographic rendering of approximately one-quarter of the face of a $1 Federal Reserve Note, tinted in green, showing the portrait of George Washington shedding a dark green tear. (A copy of that cover is annexed to the Complaint as Exhibit A, and to this affidavit as Exhibit 4. Its editorial and artistic value to TIME is discussed in the accompanying affidavits of TIME's Managing Editor and Art Director; see Affidavit of Ray C. Cave ("Cave Aff.") at ¶¶ 6, 10-11, and Affidavit of Rudolph Hoglund ("Hoglund Aff.") at ¶¶ 7-8.) Approximately one month after that issue of TIME was published, William Lometti, an agent of the Secret Service, telephoned Dennis Wheeler of Time's production department to advise him that in the opinion of the Department of the Treasury, the photograph used on the December 14, 1970, cover of TIME violated Federal law. When Harry M. Johnston of Time's legal department called Mr. Lometti the following day to inquire why the cover was unlawful, Mr. Lometti replied that Federal law bars publication in color of any likeness of the currency, and warned that Time must cease and desist from further violations. Mr. Lometti volunteered, however, to furnish "advisory opinions" on behalf of the Secret Service as to

the permissibility of photographs and artwork which Time might wish to publish in its magazines in the future.

12. The July 29, 1974, issue of TIME contained at p. 43-44 an essay captioned "How to Mobilize Against Inflation", and was illustrated at p. 43 by a photographic reproduction in black and white of approximately one-half of the face of a $1 Federal Reserve Note, substantially obscured by an overlaid picture of a life preserver. (A copy of the essay in which that photograph appeared is annexed to the Complaint as Exhibit B, and to this affidavit as Exhibit 5.) Approximately two months after that issue of TIME was published, E. Gabriel Perle of Time's legal department was visited in his office by Gerard R. Connolly, an agent of the Secret Service, who advised him that in the opinion of the Department of the Treasury, the photograph on p. 43 of the July 29, 1974, issue of TIME violated the provision of Title 18, U.S.C. § 504 barring the publication in black and white of any illustration of any part of a specimen of United States currency that is not less than three-quarters nor more than one and one-half times actual size, and warned that Time must cease and desist from further violations. Pursuant to Mr. Connolly's instructions, Time's legal department promptly undertook to ensure that all plates and other materials used in the production of the photograph were destroyed, and advised Mr. Connolly that this had been accomplished by letter dated October 29, 1974.[2]

13. The cover of the February 23, 1976, issue of TIME illustrated a story appearing at pp. 28-36 in that issue about alleged international bribery by an American aircraft firm, and contained a photographic reproduction in black and white of a $1,000 Federal Reserve Note clutched in a "cartoon" hand, and substantially obscured by both the cartoon thumb and the printed legend, "The Big Payoff". (A copy of that cover is

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[2] As noted in the accompanying affidavit of Henry A. Grunwald, the Editor-in-Chief of Time Inc., plaintiff has no objection to that part of § 504 which requires that plates and negatives of photographs and artwork depicting currency be destroyed after their final use. (*See* Affidavit of Henry A. Grunwald ¶ 13.)

annexed to the Complaint as Exhibit C, and to this affidavit as Exhibit 6; it is further discussed in Cave Aff. ¶ 7 and Hoglund Aff. ¶ 7.) By letter dated February 24, 1976, a copy of which is annexed hereto as Exhibit 7, Time was advised by H. Terrence Samway, Assistant Legal Counsel to the Director of the Secret Service, that in the opinion of the Department of the Treasury, the February 23, 1976, cover of TIME violated the provision of Title 18, U.S.C. § 504 prohibiting the publication in black and white of any illustration of a specimen of United States currency that is not less than three-quarters nor more than one and one-half actual size. Mr. Samway further advised Time that in the opinion of the Department of the Treasury, publication of a black and white illustration of a specimen of United States currency of the permitted size is lawful only if, in addition, the illustration appears for "historical, educational, numismatic or newsworthy purposes", and is "accompanied by information about the particular item reproduced and [is not] used for decorative or eye-catching purposes." On February 25, 1976, agents of the Secret Service appeared at the office of Walter S. Censor of Time's legal department, and warned that Time must cease and desist from further violations of the penal laws prohibiting illustration of the currency.

14. The cover of the November 1, 1976, issue of TIME illustrated a story appearing at pp. 18-22 of that issue captioned "Voting Your Pocketbook", and contained photographic reproductions in color of folded $1, $10 and $20 Federal Reserve Notes reduced to less than one-half actual size, clutched in a human hand. (A copy of that cover is annexed to the Complaint as Exhibit D and to this affidavit as Exhibit 8; its editorial and artistic purposes are described in Cave Aff. ¶ 8 and Hoglund Aff. ¶¶ 7-8.) By letter dated November 18, 1976, a copy of which is annexed hereto as Exhibit 9, Mr. Censor was advised by Mr. Rasor that in the opinion of the Department of the Treasury, the photograph used on the November 1, 1976, cover of TIME violated the provision of Title 18 prohibiting publication in color of any likeness of the currency. Mr. Rasor further reported that the Treasury Department's "files indicate that Time Incorporated has repeatedly failed to comply with

the criteria [governing printing or publication of likenesses of the currency] outlined in [Title 18, U.S.C.,] section 504 . . . .", warned that Time must cease and desist from further violations, and advised that if Time failed to comply with this instruction, the Secret Service would "refer the matter to the United States Attorney's office in the Southern District of New York for appropriate action."

15. The cover of the February 12, 1979, issue of FORTUNE illustrated an article captioned "America's Invisible Rich" appearing at pp. 92-104 of that issue of the magazine, and contained a photographic reproduction in color of portions of Federal Reserve Notes, enlarged to more than twice actual size, folded twice, and enclosed within an overlaid money clip. Approximately one-third of the reverse side of a $1,000 Note and fragments of the borders of the remaining Notes were visible. (A copy of that cover is attached to the Complaint as Exhibit E, and to this affidavit as Exhibit 10; its purpose is discussed in Campbell Aff. ¶ 5.) Approximately nine months after that issue of FORTUNE was published, an agent of the Secret Service advised Harry M. Johnston of Time's legal department by telephone that in the opinion of the Department of the Treasury, the photograph used on the February 12, 1979, cover of FORTUNE violated the provision of Title 18 barring publication in color of any likeness of the currency, and that he had been instructed by his superiors in Washington, D.C. to give Time a " 'slap on the wrist' ".

16. Finally, the cover of the February 16, 1981, issue of SPORTS ILLUSTRATED illustrated a story appearing at pp. 14-21 of that issue about a scandal in amateur basketball, and contained photographic reproductions in color of portions of several dozen $100 Federal Reserve Notes, reduced to approximately one-third actual size, stuffed inside or descending into a basketball hoop and net. (A copy of that cover is annexed to the Complaint as Exhibit F, and to this affidavit as Exhibit 11.) On May 18, 1981, William Clancy, an agent of the Secret Service, informed Mary F. Gibbons of Time's legal department that in the opinion of the Department of the Treasury, the

photograph used on the February 16, 1981, cover of SPORTS ILLUSTRATED violated Title 18, U.S.C. ¶ 474, and that it would be necessary for the Secret Service to seize all plates and other materials used in connection with the production of that cover. Mr. Clancy requested that he be given the names and addresses of the printers who prepared the cover and of any other individuals or companies involved in its layout or physical development, and further requested an "interview" with a member of Time's management, with counsel present if so desired. In the course of the conversation, Mr. Clancy stated that the statutory prohibition on publication of currency illustrations is intended as a broad deterrent, to forestall the possibility that someone involved in the process of printing illustrations might conclude it was easy to copy currency, and thus be inspired to do so for profit.

17. On May 21, 1981, Ms. Gibbons received from Mr. Clancy in the mail a publication of the Department of the Treasury, a copy of which is annexed hereto as Exhibit 12, which purports to set forth pertinent information as to the conditions under which it is permissible to print illustrations of United States and foreign obligations and securities. *Inter alia,* that publication states:

> "To be permissible, an illustration must be accompanied by numismatic, educational, historical or newsworthy information relating directly to the item that is illustrated. Illustrations used primarily for decorative or eye-catching purposes are not permissible." (Exhibit 12, page 2 of text.)

Conclusion

18. The events and communications described in the foregoing paragraphs and the exhibits annexed hereto reveal that

(a) the Department of the Treasury and the Secret Service have failed to arrive at a consistent view of either

the purpose or the scope of the proscriptions in Title 18, U.S.C. respecting publication of likenesses of currency;

(b) the Department of the Treasury and the Secret Service construe Title 18, U.S.C. § 504 substantially to extend the sweep of its prohibitions, and to confer upon those agencies discretion to determine the identity and nature of the "educational, historical or newsworthy purposes" for which some black and white illustrations of currency are permitted; and

(c) Title 18, U.S.C. § 474 ¶ 6 and § 504 are construed by the Department of the Treasury and the Secret Service absolutely to prohibit publication of illustrations of currency which pose no danger to the realization of the Government's interest in prevention of counterfeiting and forgery, and are applied by those agencies entirely without regard to the likelihood that a particular illustration might actually be used for counterfeiting purposes.

/s/ FREDERICK A. O. SCHWARZ, JR.

Frederick A. O. Schwarz, Jr.

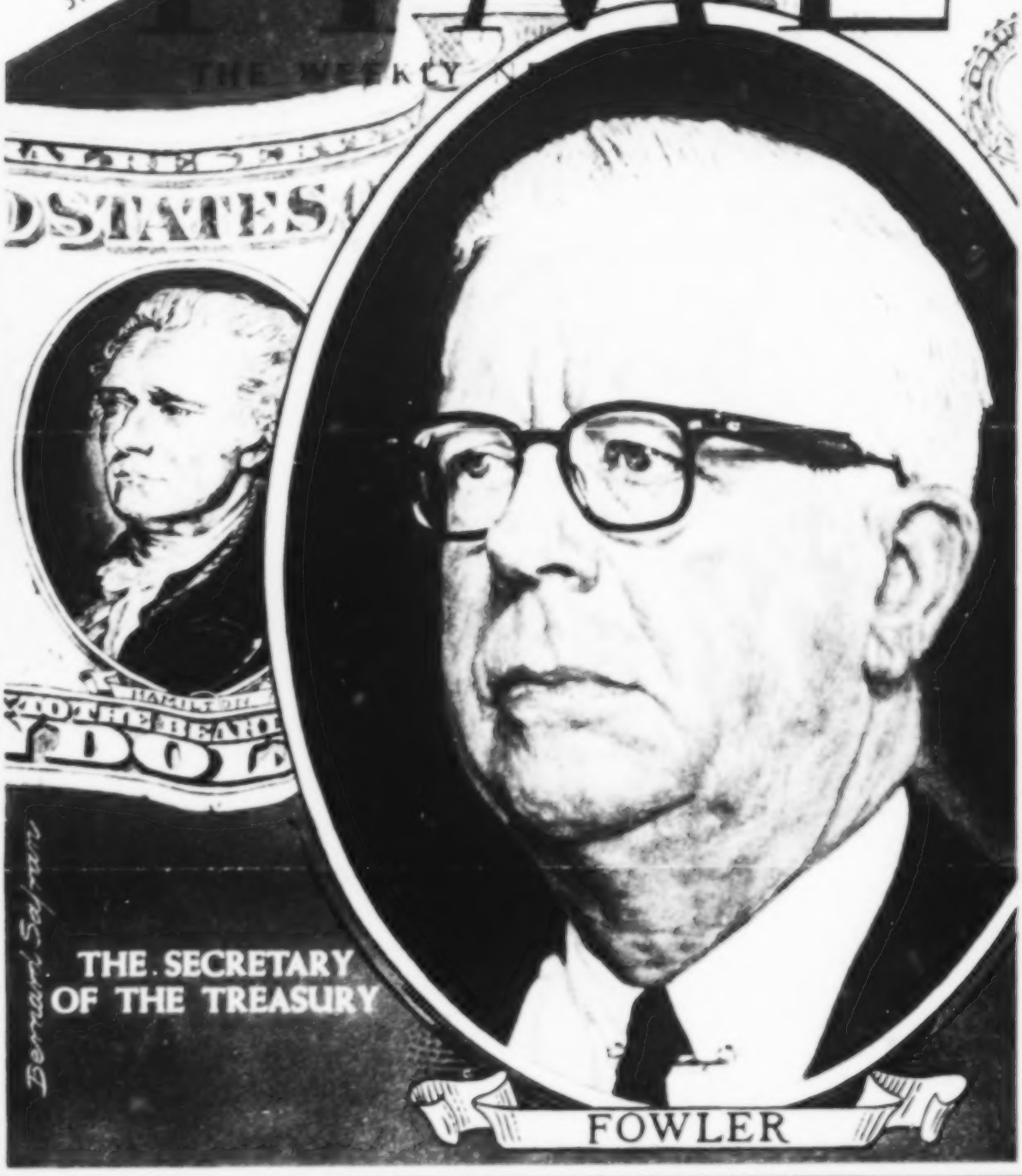
[Subscribed and Sworn to
July 20, 1981.
(Jurat omitted in printing)]

THIRTY-FIVE CENTS SEPTEMBER 10, 1962

THE WORLD'S NEED FOR MONEY
Should the Dollar Be Almighty?

TIME

THE WEEKLY



VOL. 80 NO. 11

Exhibit 4 to Schwarz Affidavit

Cover Illustration, TIME Magazine,
December 14, 1970

(same as Exhibit A to Complaint, page 13, *supra*)

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Exhibit 5 to Schwarz Affidavit

Page 43, TIME Magazine,
July 29, 1974

(same as Exhibit B to Complaint, page 15, *supra*)

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Exhibit 6 to Schwarz Affidavit

Cover Illustration, TIME Magazine,
February 23, 1976

(same as Exhibit C to Complaint, page 17, *supra*)

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Exhibit 7 to Schwarz Affidavit

DEPARTMENT OF THE TREASURY

UNITED STATES SECRET SERVICE

WASHINGTON, D.C. 20223

OFFICE OF THE DIRECTOR

February 24, 1976

EARLY REPLY

[Stamped legend of recipient]

Time Magazine
Rockefeller Center
New York, New York 10020

Dear Sirs:

Reference is made to your February 23, 1976 issue of Time Magazine in which you use a $1,000 Federal Reserve Note on the cover and in an article about "The Big Payoff".

In that connection, sections 8, 474 and 475 of title 18, United States Code, generally prohibit the reproduction of currency.

Section 504 of title 18, United States Code, makes an exception to the foregoing prohibitions and permits illustrations of paper money provided the reproductions are in black and white; are of a size less than three-fourths or more than one and one-half times the size of genuine obligations and appear in articles, books, journals, newspapers, or albums for historical, educational, numismatic or newsworthy purposes. The Department has taken the position that in order for an illustration to be permissible it must be accompanied by information about the particualr item reproduced and cannot be used for decorative or eye-catching purposes.

It is the opinion of this Office, in which the Office of General Counsel concurs, that your reproduction of the $1,000

Federal Reserve Note on the cover of Time Magazine of February 23, 1976 is prohibited since it does not comply with *all* four criteria of 504, *supra*, specifically the size requirement.

Sincerely yours,

David H. Martin
Legal Counsel

By: /s/ H. TERRENCE SAMWAY
H. Terrence Samway
Assistant Legal Counsel

Received
March 4, 1976
Harry M. Johnston, III

[Stamped legend of recipient]
[underscoring by recipient]

Exhibit 8 to Schwarz Affidavit

Cover Illustration, TIME Magazine,
November 1, 1976

(same as Exhibit D to Complaint, page 19, *supra*)

Exhibit 9 to Schwarz Affidavit

DEPARTMENT OF THE TREASURY
UNITED STATES SECRET SERVICE
WASHINGTON, D.C. 20223

OFFICE OF THE DIRECTOR

November 18, 1976

Mr. Walter S. Censor
Associate Counsel
Time Incorporated
1271 Avenue of the Americas
New York, New York 10020

Dear Mr. Censor:

Reference is made to the November 1, 1976 issue of TIME magazine. Further reference is made to the cover of this magazine where there appear reproductions of Federal Reserve Notes ($1, $10, and $20).

The subject reproductions of Federal Reserve Notes appearing on the cover of TIME magazine are in violation of section 474 of title 18, United States Code, which prohibits making any photograph, print or impression in the likeness of obligations and securities of the United States, or any part thereof.

While section 504 of title 18, United States Code, makes an exception to the foregoing prohibition and permits illustrations of obligations and securities of the United States provided certain size and color restrictions are met and they appear in articles, books, journals, newspapers or albums for historical, educational, numismatic or newsworthy purposes, it does not permit illustrations of obligations and securities in color or for advertising purposes.

Our files indicate that Time Incorporated has repeatedly failed to comply with the criteria outlined in section 504, *supra*. This matter was first brought to our attention after publication

of the November 5, 1973 issue of TIME magazine which contained an advertisement by Electronics International. On January 25, 1974, Secret Service Agents interviewed Mr. John Heath, Divisional Sales Manager, advising him of the violation. Mr. Heath stated that Time would cease and desist this type of advertising.

The July 1974 issue of TIME contained a partial reproduction of a $1 Federal Reserve Note, which was also in violation of section 474, *supra*. On September 20, 1974, agents of this Service interviewed Mr. Pearle, Attorney for Time, Incorporated, advising him of the violation. Mr. Pearle agreed to cease and desist reproductions of this type in the future.

On the cover of the February 23, 1976, issue of TIME there appeared a $1,000 Federal Reserve Note reproduction. On February 25, 1976, agents of this Service interviewed you and they were assured there would be no repetition of this violation.

We are again advising Time, Incorporated to cease and desist from the use of any future reproductions of currency appearing in color or for advertising purposes. If Time, Incorporated fails to comply with this request, we will refer the matter to the United States Attorney's office in the Southern District of New York for appropriate action.

Sincerely yours,

David H. Martin
Legal Counsel

By: /s/ ROBERT H. RASOR

ROBERT H. RASOR
Assistant Legal Counsel

Exhibit 10 to Schwarz Affidavit

Cover Illustration, FORTUNE Magazine,
February 12, 1979

(same as Exhibit E to Complaint, page 21, *supra*)

Exhibit 11 to Schwarz Affidavit

Cover Illustration, SPORTS ILLUSTRATED Magazine,
February 16, 1981

(same as Exhibit F to Complaint, page 23, *supra*)

Use Of Illustrations Of Obligations & Securities Of The United States & Foreign Governments

Department Of The Treasury

United States Secret Service

The Department of the Treasury sponsored legislation to liberalize and clarify laws relating to the use of illustrations and films of paper money, postage and revenue stamps, checks, bonds and other obligations of the United States and foreign governments. This legislation was passed by Congress on September 2, 1958 (Public Law 85-921) and was further amended on June 20, 1968, to permit reproductions of postage stamps in color under certain conditions (Public Law 90-353).

As the Federal enforcement agency charged with safeguarding our Nation's currency, the United States Secret Service believes that any permission to photograph and reproduce pictures of money, in color, would seriously weaken the safeguards designed to protect our currency.

As an aid to those interested in the use of such illustrations and films, this leaflet sets forth pertinent information as to the conditions under which it is permissible to print illustrations and to make films of United States and foreign obligations and securities.

PAPER MONEY, CHECKS, BONDS, ETC.

Printed illustrations of paper money, checks, bonds and other obligations and securities of the United States and foreign governments are permissible for numismatic, educational, historical and newsworthy purposes, and for numismatic or philatelic advertising but not for general advertising purposes. Illustrations must be in black and white and must be less than three-fourths or more than one and one-half times the size of the genuine instrument. No individual facsimiles of such obligations are permitted, and no illustrations of paper money, checks or bonds may be in color.

To be permissible, an illustration must be accompanied by numismatic, educational, historical or newsworthy information relating directly to the item that is illustrated. Illustrations used primarily for decorative or eye-catching purposes are not permissible.

Motion-picture films, microfilms and slides of paper money, checks, bonds and other obligations and securities of the United States and foreign governments are permitted in black and white or in color for projection upon a screen or for use in telecasting. They may not be used for advertising purposes, except philatelic or numismatic advertising.

ADVERTISING

Printed illustrations or films of paper money, checks or bonds are not permitted in connection with advertising. However, printed illustrations of paper money, but not films, may be used in connection with numismatic advertising. Also, Treasury regulations permit the illustration of United States bonds in connection with a campaign for the sale of such bonds.

UNITED STATES AND FOREIGN POSTAGE STAMPS

Printed illustrations of canceled and uncanceled United States postage stamps are permissible for articles, books, journals, newspapers or albums for philatelic, educational, historical and newsworthy purposes.

"less than 3/4 or more
than 1 1/2 times"
ONE DOLLAR

Black and white illustrations may be of any size. Colored illustrations of canceled United States postage stamps may be of any size. However, illustrations in color of uncanceled United States postage stamps must be less than three-fourths or more than one and one-half times the size of the genuine stamp.

Printed illustrations of canceled foreign stamps in black and white or color, are permissible in any size and for any purpose.

Black and white and color illustrations of uncanceled foreign postage stamps are permitted for philatelic, educational, historical and newsworthy purposes. Black and white illustrations may be of any size, but color illustrations must be less than three-fourths or more than one and one-half times the size of the genuine stamp.

Motion-picture films and slides of United States and foreign postage stamps are permissible in black and white or in color for projection upon a screen or for use in telecasting. They are not permissible for advertising purposes except for philatelic advertising.

PHILATELIC ADVERTISING

Black and white illustrations of canceled and uncanceled United States and foreign postage stamps, as well as colored illustrations of canceled postage stamps are permissible in any size, for philatelic advertising. Uncanceled colored illustrations of United States and foreign postage stamps are permitted for philatelic advertising, but must meet the three-fourths or one and one-half size restrictions.

Note: Canceled U. S. and foreign postage stamps must bear an official cancellation mark, i.e., the stamps must have been used for postage.

REVENUE STAMPS

Regulations for printed illustrations of United States and foreign revenue stamps are the same as for postage stamps, except that colored illustrations of United States revenue stamps are not permitted.

DESTRUCTION OF PLATES AND NEGATIVES

The plates and negatives, including glossy prints, of any United States or foreign obligations produced for any of the above purposes, must be destroyed after their final use for the purpose for which they were made.

COINS

Photographs or printed illustrations, motion-picture film or slides of United States and foreign coins may be used for any purpose including advertising.

With few exceptions, existing law generally prohibits the manufacture, sale or use of any token, disk or device in the likeness or similitude of any coins of the United States or of any foreign country which are issued as money.

"canceled stamps may
be in color &
in any size"
8¢
ENHOWER USA

EXCERPTS FROM APPLICABLE STATUTES

TITLE 18, U.S. CODE, SECTION 8

"The term 'obligation or other security of the United States' includes all bonds, certificates of indebtedness, national bank currency, Federal Reserve notes, Federal Reserve bank notes, coupons, United States notes, Treasury notes, gold certificates, silver certificates, fractional notes, certificates of deposit, bills, checks, or drafts for money, drawn by or upon authorized officers of the United States, stamps and other representatives of value, of whatever denomination, issued under any Act of Congress, and canceled United States stamps."

TITLE 18, U.S. CODE, SECTION 481

"Whoever, except by lawful authority, prints, protographs, or makes, executes, or sells any engraving, photograph, print, or impression in the likeness of any genuine note, bond, obligation, or other security, or any part thereof, of any foreign government, bank, or corporation; or whoever brings into the United States any counterfeit plate, stone, or other thing, engraving, photograph, print, or other impressions of the notes, bonds, obligations, or other securities of any foreign government, bank, or corporation shall be fined not more than $5,000 or imprisoned not more than five years, or both."

TITLE 18, U.S. CODE, SECTION 15

"The term 'obligation or other security of any foreign government' includes, but is not limited to, uncanceled stamps, whether or not demonetized."

TITLE 18, U.S. CODE, SECTION 504

"Notwithstanding any other provision of this chapter, the following are permitted:

(1) the printing, publishing, or importation, or the making or importation of the necessary plates for such printing or publishing, of illustrations of—

(A) postage stamps of the United States,

(B) revenue stamps of the United States,

(C) any other obligation or other security of the United States, and

(D) postage stamps, revenue stamps, notes, bonds, and any other obligation or other security of any foreign government, bank, or corporation,

for philatelic, numismatic, educational, historical, or newsworthy purposes in articles, books, journals, newspapers, or albums (but not for advertising purposes, except illustrations of stamps and paper money in philatelic or numismatic advertising of legitimate numismatists and dealers in stamps or publishers of or dealers in philatelic or numismatic articles, books, journals, newspapers, or albums). Illustrations permitted by the foregoing provisions of this section shall be made in accordance with the following conditions—

(i) all illustrations shall be in black and white, except that illustrations of postage stamps issued by the United States or by any foreign government may be in color;

(ii) all illustrations (including illustrations of uncanceled postage stamps in color) shall be of a size less than three-fourths or more than one and one-half, in linear dimension, of each part of any matter so illustrated which is covered by subparagraph (A), (B), (C), or (D) of this paragraph, except that black and white illustrations of postage and revenue stamps issued by the United States or by any foreign government and colored illustrations of canceled postage stamps issued by the United States may be in the exact linear dimension in which the stamps were issued; and

(iii) the negative and plates used in making the illustrations shall be destroyed after their final use in accordance with this section.

(2) the making or importation, but not for advertising purposes except philatelic advertising, of motion-picture films, microfilms, or slides, for projection upon a screen or for use in telecasting, of postage and revenue stamps and other obligations and securities of the United States, and postage and revenue stamps, notes, bonds, and other obligations or securities of any foreign government, bank, or corporation. No prints or other reproductions shall be made from such films or slides, except for the purposes of paragraph (1), without the permission of the Secretary of the Treasury.

For the purposes of this section the term 'postage stamp' includes postage meter stamps."

TITLE 18, U.S. CODE, SECTION 474

"Whoever prints, photographs, or in any other manner makes

or executes any engraving, photograph, print, or impression in the likeness of any such obligation or other security (of the United States), or any part thereof, or sells any such engraving, photograph, print, or impression, except to the United States, or brings into the United States, any such engraving, photograph, print, or impression, except by direction of some proper officer of the United States; • • • shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both."

TITLE 18, U.S. CODE, SECTION 475

"Whoever designs, engraves, prints, makes, or executes, or utters, issues, distributes, circulates, or uses any business or professional card, notice, placard, circular, handbill, or advertisement in the likeness or similitude of any obligation or security of the United States issued under or authorized by any Act of Congress or writes, prints, or otherwise impresses upon or attaches to any such instrument, obligation, or security, or any coin of the United States, any business or professional card, notice, or advertisement, or any notice or advertisement whatever, shall be fined not more than $500."

TITLE 18, U.S. CODE, SECTION 489

"Whoever, within the United States, makes or brings therein from any foreign country, or possesses with intent to sell, give away, or in any other manner uses the same, except under authority of the Secretary of the Treasury or other proper officer of the United States, any token, disk, or device in the likeness or similitude as to design, color, or the inscription thereon of any of the coins of the United States or of any foreign country issued as money, either under the authority of the United States or under the authority of any foreign government shall be fined not more than $100."

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TIME INCORPORATED,
Plaintiff,

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY,
Et Al.,
Defendants.

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81 Civ. 3218 (VLB)

AFFIDAVIT OF HENRY A. GRUNWALD

(filed July 21, 1981)

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

HENRY A. GRUNWALD, being duly sworn, deposes and says:

1. I am the Editor-in-Chief of Time Inc., and am ultimately responsible for the editorial content and approach of all of Time Inc.'s publications, including TIME, FORTUNE, SPORTS ILLUSTRATED, LIFE, PEOPLE, MONEY and DISCOVER. I submit this affidavit on behalf of Time Inc.; its editors, journalists and artists; and, in my opinion, in the interest of the readers of the magazines published by Time. Because they significantly restrict Time Inc.'s ability to attract,

engage and communicate with our readers about important contemporary issues—such as inflation, the economy and corruption, to name but a few—for absolutely no sensible purpose, I believe the criminal statutes challenged in this lawsuit impose an unaccountable and wholly unjustifiable burden upon free expression.

Summary

2. After briefly setting forth my background as a journalist and editor, I shall explain why symbolic representations of money are important to Time Inc., and why the Federal statutes prohibiting their use constrain our ability to report news and express editorial ideas to the public. Particularly in today's world, where communication must be immediate and compact to be powerful, visual symbols are indispensable aids to Time's editors and artists. The statutes involved here tell journalists that they may be held criminally liable if they choose to use, as a vehicle for communication, a symbol of inestimable value in reporting on issues which rank among the preeminent news stories of our time. The prohibitions they impose serve no useful purpose, for the idea that the distorted depictions—or any depictions—of currency published by Time Inc. could be of any value in counterfeiting is ridiculous.

3. I will also explain in this affidavit why a statutory exemption allowing certain highly restricted uses of some black and white illustrations of currency—if they are thought "newsworthy" by the Government—places a heavy burden on our form of journalism. Color artwork and photographs enable magazines to capture certain kinds of events and ideas with special drama and impact, and Time Inc. has greatly expanded its use of color during the past decade. A law that denies us the right to publish color illustrations severely inhibits our expression, particularly when our broadcast competitors must endure no similar constraint.

4. Before explaining why I believe these prohibitions are irrational and unwarranted, I wish to recount briefly my background as a journalist.

Personal Background

5. I was born in Vienna, Austria, and came to the United States in 1940 at the age of 17. Both my career in journalism and my association with Time Inc. began when I was in college at New York University, when I worked part time at night as a copy boy for TIME magazine, and also served as editor-in-chief of the college paper. After a stint as a reporter for a labor newspaper, I was hired by TIME magazine as a writer on a trial basis in July 1945. Four months later I was appointed to the foreign news department, and six years after that, I became a Senior Editor of the magazine. I was appointed the Assistant Managing Editor of TIME in 1966, and the Managing Editor in 1968.

6. In the past 30 years, I have contributed scores of essays and cover stories to TIME, edited material for most departments of the magazine, and witnessed as well as initiated many changes in its format and editorial policy, including greatly expanded use of color photography. Though I became Corporate Editor of Time Inc. in 1977, and have been Editor-in-Chief of all Time Inc. publications since June 1979, I still occasionally write essays for TIME on a range of issues, including a recent essay on the First Amendment and the introduction to "American Renewal", a series of articles that appeared in all Time Inc. magazines.

7. At present, I am a member of the Boards of Directors of Time Inc., Time-Life Books Inc. and the Washington Star, as well as a director of the World Press Freedom Committee and a member of the Council on Foreign Relations, on whose behalf I recently chaired a commission on U.S. policy toward the Soviet Union. In addition to many articles for various magazines, I have written or contributed to several books, including biographies of Churchill and Salinger. In May 1979, I spoke at the Judicial Conference of the Second Circuit on the subject of freedom of the press.

The Importance of Currency as an Expressive Symbol

8. The law challenged here is, in my view, a perplexing and troubling historical aberration. Over my years as a journalist I have never encountered a statute that criminalizes the journalistic use of a common, nonpolitical cultural symbol. It may be useful to view the subject matter of this lawsuit from a historical and philosophical perspective. Throughout history, people have communicated with each other through symbols. Some symbols have deep personal meaning and serve to strengthen human bonds—for example, the Christian cross, the Jewish star of David, and the flag of one's country all serve to unify like-minded men and women in a common purpose. Other symbols, such as the Nazi swastika or the white hood of the Klansman, evoke powerful emotional reactions because they remind us of man's ability to find common purpose in racial or religious hatred. Indeed, some symbols, such as the hammer and sickle, have been thought so inherently powerful, and the ideas they represent so dangerous, that some governments have attempted to ban the use of the symbols themselves.

9. Of course, the symbol involved in this lawsuit—an illustration of a portion of paper currency—does not threaten governments, nor does it move people in love or hatred as do some other symbols. But this pedestrian symbol shares with the more spectacular symbols a common characteristic: all have the ability to capture and convey the essence of a thought in nonverbal form. Everyday experience teaches that the modern world—a world of corporate images, sleek logos, and public relations experts—fully understands the enormous power of communicative symbols. Both print and broadcast journalists rely heavily upon them to attract the attention of the public and to convey relatively brief analysis of complex ideas. An illustration of a big apple is now synonymous with New York City; a subway token reproduced in a newspaper connotes the story of the transit fare increase; five interlocking rings arranged a certain way convey the image of the Olympics; the dove has been transformed into a symbol for peace. In a time when we increasingly enhance our understanding of the events of our

world by communicating through such everyday images as an apple or a subway token, it strikes me as particularly odd that one of the most common and best understood symbols, money, is deleted from the journalist's lexicon.

10. The symbol of currency is of special value to journalists for several reasons. It is valuable, first, because the ideas it represents frequently involve such abstract issues as inflation, trade balances, and multi-billion dollar budgets—intangible phenomena for which graphic communicative devices are particularly useful to symbolize the news story behind the issue. For example, unlike many other news stories we cover, the inflation story is not comprised of noteworthy events or dramatic moments: we cannot take pictures of people experiencing the pain of the high cost of living in the same way we may be able to photograph an assassination attempt. As the accompanying affidavits of Time Inc. managing editors and art directors document in detail, the best graphic device for such stories is often money itself. For many purposes, no other symbol comes close in impact, versatility or precision.

11. Secondly, representations of money are important to journalists because the ideas they may be used to depict comprise a principal—if not *the* principal—continuing news story of this decade. In many decades in journalism, I have witnessed a succession of issues dominate the news—world war, cold war, civil rights, Viet Nam and Watergate spring immediately to mind, among many others. Today's issue of similar magnitude is the economy, with all its related subparts: tax cuts, unemployment, interest rates, Government spending, foreign industrial competition, and so forth, are all front page news. Time Inc.'s magazines cover them extensively because our readers demand that we keep them informed. By restricting our ability to employ illustrations of currency, these Federal statutes substantially deny us the use of a symbol uniquely suited to reporting on these critical issues, at a time when their importance to the public is increasing.

The Pointlessness of the Statutory Prohibitions

12. I am informed that the criminal laws restraining our use of illustrations of money were originally enacted at the time of the Civil War as part of a general statute relating to counterfeiting. Whatever a mid-nineteenth century magazine editor might have thought of them at the time, an editor of magazines published in the last quarter of the twentieth century can only find them nonsensical. The idea that a picture of paper money printed on one side of a page of glossy magazine stock is likely to be confused for a genuine United States note is, of course, absurd. And now that the technology of photoduplication is so generally and cheaply available to all, the idea that a would-be counterfeiter would use one of our illustrations —instead of taking his or her own dollar to a copying machine —is flatly ridiculous. This is all the more true because, as the exhibits to the Complaint and the Schwarz Affidavit reveal, the photographs and artwork we publish generally involve distorted, twisted and obscured representations of currency in the wrong size, the wrong colors, and often even the wrong shape. The thought that any of these might aid a counterfeiter is preposterous.

13. By the same token, those familiar with the magazine printing process know very well that the materials used to produce four-color offset magazine covers showing usually distorted illustrations of currency can be of little value to someone attempting to counterfeit a hand-engraved, two-sided dollar bill. However, if the Government perceives some remote possibility that the color offset plates used to produce our magazine covers might somehow be abused, Time Inc. does not object to that part of the statute which requires that materials used to print representations of money be destroyed after their final use. I understand that as a general matter, plates used in the production of covers for Time Inc.'s magazines are the property of the respective firms with which we have our printing contracts, and are routinely disposed of by the printers for their scrap metal value within a short time (say, 48 hours) after the print run is completed. The film from which the plates

are made generally remains Time Inc.'s own property. We would be happy to comply with any reasonable requests from the Government for prompt destruction of the materials which are ours to destroy, and to seek suitable assurances from our printers respecting prompt and secure disposal of the materials which remain with them.

The Statutory System Imposes Unwarranted Restrictions Upon Journalistic Expression

14. Even though there is no plausible connection between the artistic renderings of currency published by Time Inc. and the possibility of counterfeiting, these statutes impose severe restrictions on expression which the statutory exemption does not meaningfully mitigate. At a time when our magazines increasingly rely on photographs and artwork to accompany their texts, the law substantially prohibits not only the use of illustrations of currency itself, but also the depiction of *any part* of paper money, even though our use of such fragmentary pictures—distorted, enlarged, reduced, and juxtaposed with other common cultural symbols shared and understood by our readers—obviously offers no aid to a counterfeiter. Moreover, at a time when our magazines are increasing their use of color, the statutes totally forbid *any* rendering of currency in color. In a world where all visual communication media—including the television and movie industries, whose expression is not restrained by this law—rely extensively on color, laws which restrict our ability to use color pictures severely constrain our ability to express ourselves, and place us at a competitive disadvantage. Once again, this is all for no practical or valid purpose, for the usually exaggerated and distorted colors we have generally employed in our illustrations of money plainly preclude their use by even the most amateur criminal.

15. Journalists rightly abhor any statute which purports to guide or regulate their expression. The statutes here specify that illustrations of currency may be lawful if they are of a particular size, but not otherwise. They tell us an illustration may be legal if it is in black and white—ironically, the

predominant colors of the front of any piece of United States currency—but not if it is in color. Furthermore, they indicate that illustrations of currency must fulfill undefined "newsworthy", "historical" or "educational" purposes if they are to be used at all. To implement all this, the Government has adopted a system of "advisory opinions" which call upon us to tender our illustrations to the Secret Service for approval in advance. Collectively, the requirements of this statutory exemption impose a form of governmental regulation of the press unlike anything I have experienced in my journalistic career.

16. We at Time Inc. have been visited by government agents who have told our artists and editors what they may and may not publish. Government agents have demanded the names and addresses of all the people involved in printing a recent cover of SPORTS ILLUSTRATED. They have threatened us with criminal prosecution and suggested we obtain prior clearance on any illustration of currency we wish to use. This government conduct, in my opinion, undermines the independence and integrity of the press. This is why we have asked the Court to declare these laws unconstitutional.

Conclusion

17. Each of Time Inc.'s publications performs traditional journalistic functions in its own special style, reporting news to the public, analyzing complex problems, criticizing and evaluating governmental policies and social institutions. Unlike book publishers, we rely on concise articles and graphic representations to convey complicated ideas to our readerships. Unlike newspapers, we make abundant use of color in most of our magazines, most importantly on our covers, where the use of color serves both to attract attention and describe the contents of our cover story. All of our magazines, and particularly weekly publications such as TIME and SPORTS ILLUSTRATED, work under tight schedules where no deadline may be missed, and the editorial and artistic judgments required to get the magazine on the newsstand must be made

quickly. Unlike network television and film documentaries, we make extensive use of still photographs and graphic symbols—rather than dramatic newsreel footage or powerful soundtracks—to engage readers and convey information. Because these statutes ban color depictions of any part of this nation's medium of exchange, they severely restrict our ability to communicate on issues of great contemporary importance, and place us at a competitive disadvantage in relation to other forms of communication that use color. They do so in the name of a governmental purpose which our illustrations cannot possibly endanger. For all of these reasons, I believe they unjustifiably abridge the freedom of the press.

/s/ HENRY A. GRUNWALD
Henry A. Grunwald

[Subscribed and sworn to
July 17, 1981.
(Jurat omitted in printing)]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TIME INCORPORATED,
Plaintiff,

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY,
Et Al.,
Defendants.

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81 Civ. 3218 (VLB)

AFFIDAVIT OF GILBERT ROGIN

(filed July 21, 1981)

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

GILBERT ROGIN, being duly sworn, deposes and says:

1. I am the Managing Editor of SPORTS ILLUSTRATED, a Time Inc. publication, and in that capacity am the magazine's highest editorial executive. I have worked for SPORTS ILLUSTRATED since 1955, and was a writer, Senior Editor and Assistant Managing Editor before being named Managing Editor in 1979.

2. In May of this year, I have been informed, a Secret Service agent suggested to a member of Time's Legal Department that I could be criminally charged because the SPORTS ILLUSTRATED cover of February 16, 1981—showing numerous $100 bills, none entirely visible, reduced to about one-third their real size, and stuffed into a basketball net—violated a federal anticounterfeiting law. I submit this affidavit to describe the artistic and editorial judgments involved in the use of that magazine cover, and also to explain why the ability to incorporate color representations of money in SPORTS ILLUSTRATED's graphics is valuable in my work as Managing Editor.

The Story of the February 16, 1981 SPORTS ILLUSTRATED Cover.

3. In February 1981 SPORTS ILLUSTRATED developed a story documenting an important case of alleged corruption in college basketball. Players at Boston College were assertedly being paid $2,500 per player per game to "shave points"—that is, to ensure (by missing baskets, committing fouls or slowing the pace of the scoring in the game) that Boston College would win by fewer points than the "betting line" if it was favored to win, or lose by more points if it was the predicted loser. The SPORTS ILLUSTRATED story, entitled "How I Put The Fix In", was an exclusive first person account told by the scheme's matermind, Henry Hill, a convicted organized crime figure who says he made between $75,000 and $100,000 on the rigged games. His "partners" in this venture reportedly made over a quarter of a million dollars betting on the nine fixed games. Needless to say, this story—implicating members of a reputable college team, and told by someone like Hill—was the major sports news story of the week. SPORTS ILLUSTRATED therefore wanted to use a cover illustration that would let readers know we were featuring the story, and also attract the attention of people passing by the newsstand.

4. A picture of a basketball net filled with money seemed to us an ideal means to convey the full flavor of a news story

about corruption in basketball. Fortunately, I remembered that we had previously prepared such an illustration for another story about the corrupting influence of money in college basketball: specifically, an alleged recruiting violation. To produce that illustration, we had stuffed dozens of crisp new $100 bills into a basketball net until the net was full, and photographed the net as more $100 bills were floating down into it. No bill was shown in its entirety—each was covered by another bill, the net or the hoop. As we had never run the earlier story, the illustration had not been used, and it seemed the perfect cover for our exclusive report on the Boston College point-shaving scandal. (A copy of that cover is annexed to the Schwarz affidavit as Exhibit 11.)

5. In my opinion, this cover was a highly successful journalistic and artistic creation. Two concepts, basketball and money, were merged to communicate the single idea of sports corruption. The picture we used connoted money, lots of money, more money than an average college basketball player had ever seen before.

6. The cover for a story of a basketball scandal would have been trivialized by the use of phony money. The net could have been filled with "play" dollar bills, but the message conveyed by a phony cover would have been different. In the world of art, it is axiomatic that a different symbol yields a different message. The money the basketball players received to rig the games was, of course, quite real. The impact of this scandal upon the reputation of college basketball and upon people's confidence in the integrity of the game was also quite real. To have used phony money or play money would have detracted from the serious nature of the story and compromised our journalistic integrity. Our readers would not possibly understand that we could not use real money because a picture of a basketball hoop filled with *real* money—even though printed on only one side of a magazine page, and with no individual bill completely visible—constitutes a crime under the counterfeiting laws.

The Federal Law Criminalizes the Use of a Uniquely Powerful Symbol

7. As the recent SPORTS ILLUSTRATED cover vividly demonstrates, the particular graphic representation which this law forbids us from using—an illustration of currency—is valuable to people like myself who communicate through symbols. A dollar bill, whether a single or a thousand dollar bill, is in my experience, a uniquely powerful symbol. People recognize it immediately and universally. With little or no textual support, an illustration of money can suggest to a SPORTS ILLUSTRATED reader many different ideas, such as the high level of baseball salaries, purses for championship events, the amount of money bet at the Kentucky Derby, scalping of Super Bowl tickets, corruption in the world of boxing—in short, any transaction involving money. In the instance of the basketball story, we showed lots of money to suggest the power of money to corrupt human values. In that story Mr. Hill, the fixer, closed his account by answering the question of how this scandal could have happened: "The money, man, the money. That's why we all did it." Money is a powerful influence in the human experience and our picture of lots of money in a basketball net evoked, I believe, that extraordinary power.

8. I would like to add that the fact that the statutes being challenged in this case contain certain exceptions for black and white depictions of money does not diminish the statutes' harmful effects upon my efforts as managing editor. For me, the ability to work in color is of precious importance. I cannot imagine what SPORTS ILLUSTRATED would look like if we were totally prohibited from using color in our photographs and artwork. Our recent conversion to almost total color capability has, in my judgment, greatly enhanced the impact and immediacy of our presentation of sports news. Color is real; it has been an important medium of artists since humans first painted on cave walls. Particularly because our readers see most of their live sports coverage on color television or color cable, color coverage is vitally important to us. For me to be told that

there is in this world one thing—one side of a Federal Reserve Note—that I cannot interpret in color impairs my magazine's ability to perform its journalistic function. We cannot make believe that people think of money as being black and white. To communicate ideas about money to people who see the world in color we must be able to use the symbol most powerfully representing money, money itself, in the colors by which money is known.

/s/ GILBERT ROGIN
Gilbert Rogin

[Subscribed and sworn to
July 17, 1981.
(Jurat omitted in printing)]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TIME INCORPORATED,

Plaintiff,

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, *Et Al.,*

Defendants.

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81 Civ. 3218 (VLB)

AFFIDAVIT OF RAY C. CAVE

(filed July 21, 1981)

STATE OF NEW YORK,
COUNTY OF NEW YORK } ss.:

RAY C. CAVE, being duly sworn, deposes and says:

1. I am Managing Editor of TIME Magazine, a Time Inc. publication, and in that capacity am the magazine's highest editorial executive. I submit this affidavit supporting plaintiff's motion for summary judgment to explain the reasons for my objections to the law plaintiff seeks to have declared unconstitutional. As a journalist, I oppose in principle any statute

which restricts the freedom of the press to decide what kind of editorial material will be published, and to control the design and layout of editorial material. As the Managing Editor of TIME magazine, I am concerned because my employees have been threatened with criminal prosecution in the course of performing their proper duties as artists, editors, printers and journalists. After briefly describing my background in journalism, I shall explain in the following pages why TIME's editors find this law to be disturbing, foolish and unfair, and discuss the importance to TIME of the right to use color depictions of money.

Background in Journalism

2. I came to Time Inc. in 1959 as a writer for SPORTS ILLUSTRATED, specializing in articles on college basketball and golf. In 1962 I switched to editing, and served successively as SPORTS ILLUSTRATED's Senior Editor, Assistant Managing Editor and Executive Editor. After seventeen years at SPORTS ILLUSTRATED, I joined TIME Magazine in March 1976 as an Assistant Managing Editor, and was named Managing Editor in 1977.

3. Earlier in my career, I was newspaperman with the Baltimore Evening Sun. I did police and investigative reporting, was a foreign correspondent in North Africa during the hostilities in Algeria, and became Assistant City Editor of the paper.

4. Although I was not an editor at TIME magazine at the time of all of the events discussed below, I am aware of the complaints, warnings and instructions TIME has received from the Secret Service respecting its use of illustrations of money, and am familiar with the photographs and artwork about which the Service complained. After almost 30 years in journalism, I believe I understand why TIME's editors and artists elected to use those illustrations, and I certainly understand how and why the law challenged in this action unjustifiably constrains freedom of expression.

Money Is a Commonly Used but Uncommonly Powerful Journalistic Symbol

5. The statutes involved here tell me and my fellow journalists that we have committed a crime if we use a particular symbol—a representation of any part of a piece of currency, no matter how small, distorted or abstract—to communicate to our readers. The illustrations of currency actually used by TIME magazine show why these statutes have no logical merit. Even though every picture or artist's rendering of currency that TIME has used showed money in a distorted fashion, and was printed on one side of lightweight magazine paper, we have been told by the Secret Service that our pictures violate the anticounterfeiting law.

6. For example, the December 14, 1970, cover of TIME showed the picture of George Washington from a dollar bill, enlarged to five times its original size, with a green tear running down Washington's cheek. Superimposed on the picture were the phrases "WORTH 73¢" and "The Battle of the Buck". (A copy of this cover is annexed to the complaint as Exhibit A and to the accompanying Schwarz affidavit as Exhibit 4.) This cover conveyed two ideas effectively and efficiently: that the cover story was about inflation and the reduced value of the dollar; and that this problem was, in the editorial judgment of TIME, serious enough to disturb the historical foundations of the country. Yet an agent of the Secret Service informed us that our use of this illustration was criminal.

7. A second example, the TIME cover of February 23, 1976, contained a black and white photograph of a $1,000 Federal Reserve Note being passed from one hand to another with a drawing of a thumb obscuring much of the bill. This artwork was accompanied by the words "The Big Payoff" and "Lockheed Scandal: Graft Around the Globe". (A copy of this cover is annexed to the complaint herein as Exhibit C and to the accompanying Schwarz affidavit as Exhibit 6.) Again, the message conveyed by the cover was graphic and powerful —American money, in denominations larger than those known to the average citizen, was passing from one hand to another

for unlawful purposes. Yet a lawyer for the Secret Service told us our use of this photograph was criminal.

8. A third example was the TIME cover of November 1, 1976, which contained a photograph of a hand clutching several Federal Reserve notes, including a one dollar bill, two ten dollar bills and a twenty dollar bill. This hand was in the "thumbs-up" position and a second hand was shown in the "thumbs-down" position. The text on the cover read, "Voting Your Pocketbook: Are Things as Good as Ford Says? Or as Bad as Carter Says?". (A copy of this cover is annexed to the complaint herein as Exhibit D and to the Schwarz affidavit as Exhibit 8.) This artwork conveyed many thoughts, including the difficult individual choice on election eve, the individual citizen's strained economic circumstances, the small denominations of money average Americans hold onto tightly, and the debate between the presidential candidates on how well or badly off Americans found themselves in 1976. The Secret Service informed us that this cover violated the law; that we were trying the government's patience by continuing such criminal behavior; and that if TIME failed to comply with the anticounterfeiting law in the future, the matter would be referred to the United States Attorney for prosecution.

9. These three TIME covers provide vivid illustrations of the symbolic power of highly stylized representations of currency. The depiction of money—a symbol whose inherent meaning was, in each instance, enhanced through creative distortion—was an integral part of the cover's concept. Yet even though what we did bore no conceivable relationship to counterfeiting, we were informed we had violated the anticounterfeiting laws. Such an interpretation of the law was surely never intended by the Congress; the illustrations could not conceivably have been used for counterfeiting purposes.

The Issues Involving Money Are Increasingly Important News Stories

10. Few news stories today are as important to the readers of TIME as stories about money—inflation, unemployment,

high interest rates, the debate over the Federal budget, the state of American business, the declining value of the dollar against foreign currencies, the increasing competition between foreign and domestic goods. These issues are not solely the concerns of economists and businessmen, for they affect every one of our readers directly and forcefully. There is no mystery in the sudden popularity of books on how to "beat" inflation, hedge against coming economic problems or take advantage of investment opportunities. These issues are commonplace concerns of our readers and receive increasingly in depth treatment in the pages of TIME.

11. As such issues come to occupy center stage in the political and social forum, news magazines need to make increasingly greater use of the graphic symbols that represent these issues. One of the best and most effective symbols to represent ideas about money is money itself, as transformed and interpreted by photographers and artists.

The Statutory Prohibition of Color Illustrations Particularly Hampers Our Ability To Communicate

12. I am aware that the statutes being challenged in this lawsuit contain exemptions designed to accommodate "educational" or "newsworthy" uses of some black and white illustrations of currency. It is my opinion that these exemptions do not provide the editorial latitude needed to express ideas through the symbolic use of money. In addition, I believe only we at TIME should have the power—and the duty—to judge what will be educational or newsworthy for our readers.

13. Freedom to express ourselves by using color illustrations when we feel they are appropriate is particularly important to TIME, which takes special pride in being the first news weekly to provide its readers with extensive color coverage of the news. The statutory requirement that we use only black-and-white representations of currency (which must also be larger than one and one-half the size, or smaller than three quarters the size, of a real United States note) obviously

restricts that freedom. At one time, of course, all magazines were printed in black and white. But today, color photographs and color artwork have become indispensable to magazine journalism. Both TIME and its main competitor, NEWSWEEK, have greatly increased their use of color. The government is not being responsive to journalistic needs by only granting permission to print some pictures of money in black and white.

14. The importance of color to TIME must also be understood in terms of our relationship to other forms of communication. Today almost all movies are filmed in color. Television news is almost exclusively shown in color. The consumers of news and ideas increasingly expect that visual communications will be in color. For example, it would be jarring and contrary to the normal human experience if the one dollar bill actually used by President Reagan in his televised address on the economy, or the fifty dollar bill actually used by Chrysler Corporation to attract car buyers in its television ads, were shown on television in black and white. Just as the President's and Chrysler's ability to communicate with the public would be greatly hampered by a statutory prohibition of their individual decisions to use a color object, the prohibition applied to TIME diminishes our ability to communicate with our readers.

As Applied to TIME, This Statue Serves No Purpose, but Restricts Our Ability To Express Editorial Viewpoints

15. It is difficult to understand why the government finds our use of photographs of money to be illegal—particularly when we never show paper currency full-sized and without some distortion, and always print our illustrations on only one side of a page. As the affidavits of Messrs. Hoglund, Rogin and Campbell show, no anticounterfeiting purpose can be served by prohibiting our use of these photographs. In addition, it is disturbing that the government, for whatever reason, seeks to engage in a tacit censorship of TIME by encouraging us to

obtain prior approval of our graphic representations of currency. On a practical level, the requirement of prior government approval is unworkable in the context of a weekly news magazine, where most editorial decisions must be made very quickly. On a more fundamental level, government censorship, no matter how well intended as an effort to enforce an illogical and unnecessary statute, offends this country's tradition of freedom of the press. I know of no other area of expression where prior approval by the government is suggested or required. Such a requirement is particularly inappropriate where the "offending" material is as harmless as the artistic interpretation of United States currency found in TIME magazine.

/s/ RAY C. CAVE
Ray C. Cave

[Subscribed and Sworn to
July 17, 1981.
(Jurat omitted in printing)]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TIME INCORPORATED,
Plaintiff,

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY,
Et Al.,
Defendants.

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81 Civ. 3218 (VLB)

AFFIDAVIT OF RUDOLPH HOGLUND

(filed July 21, 1981)

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

RUDOLPH HOGLUND, being duly sworn, deposes and says:

1. I am the Art Director of TIME Magazine, a Time Inc. publication. I submit this affidavit supporting plaintiff's motion for summary judgment to discuss two subjects. First, I wish to explain why it is important to me as an art director and journalist at TIME to express ideas through the use of symbols,

and particularly, symbolic representations of money. Second, I wish to point out several reasons why TIME's artistic use of images of money cannot serve any purpose for a would-be counterfeiter. My background and training are briefly summarized in the next paragraph.

2. I joined TIME Magazine as Assistant Art Director in 1977, and have been Art Director since June 1980. Before coming to TIME, I was Art Director of MORE Magazine in 1976-77; Design Director and then Art Director for Newspaper Enterprise Association from 1973 to 1976; an artist for NEA from 1960 to 1967; and an art director for Penn and Hamaker, an advertising agency in Cleveland, Ohio, from 1967 to 1972. During my service at NEA, I worked in close association with its production personnel and facilities, and I am fully familiar with the magazine production process.

The Artistic Importance of Currency as a Symbol

3. At TIME as at other news magazines, a principal responsibility of the Art Department is to crystallize the news and highlight thoughts expressed in text by representing ideas, events and human emotions through photographs and other artwork. Since symbols are, by definition, objects which stand for ideas, they are among the primary tools of my trade. In the hands of a talented artist, even commonplace objects can be developed into unusual and striking symbols with tremendous communicative power. At TIME, we use them in many different forms—photographs, sketches, graphs, cartoons, and so on—to deliver the news to our readers colorfully and precisely.

4. In my experience, paper money is a peculiarly powerful symbol. People recognize it immediately and universally. With little or no textual support, a picture of any piece of currency can communicate ideas about the economy, the toll of inflation, the world of finance, the high cost of living—in short, any story in which money plays a role. By combining it with other artwork, satirizing its form, exaggerating a portion of it, or

displaying it in unconventional environs, money can be interpreted artistically to convey a great many important concepts.

5. Currency is a particularly valuable symbol at TIME for several reasons. First, an illustration of currency can be used to capture and explain specific ideas about some very complex and highly abstract news subjects. Like nearly all our readers, I cannot pretend to understand all the mysteries of the Federal budget. However, a picture of a dollar bill transformed by an artist into a bar graph showing how taxpapers' tax dollars are spent by the government is, in an old cliche, worth a thousand words. So, too, the causes of inflation and its impact on our society are difficult for the average person to comprehend, but artistic depictions of the "shrinking dollar" are often extremely useful in conveying the magnitude and effects of inflation to the public. Although these seem to me rather straight-forward artistic uses of a commonly understood symbol, I am told it may be criminal to include them in an edition of TIME.

6. Secondly, currency is a valuable symbol for an artist because it deals with very basic human emotions. Greed, avarice, the lust for the power that money brings, the temptation that is posed by easy money, can all be conveyed effectively and dramatically through the symbol of money itself. For example, few images are as vivid from the days of the Watergate scandal as the image of men carrying paper bags full of $100 bills to be used as hush money. Similarly, the picture of a United States Congressman stuffing his coat pocket full of money received from a supposed Arab sheik graphically captures the Abscam story. Artists employed by news magazines covering such stories need to be free to use such valuable graphic devices without risking prosecution ourselves, and the government's interference with our ability to do so is both puzzling and troubling.

The Currency Illustrations Used by TIME Can Be of No Aid to a Counterfeiter

7. As is generally true when a commonplace object is artistically represented as a symbol, it is often necessary to *do*

something with a picture of money in order to convey a particular message. That is, when used as a symbol, money may be exaggerated, reduced, twisted, distorted, covered, colored, or otherwise altered to say what the artist wants to say. Three recent uses of currency illustrations in TIME provide good examples of my point. TIME's December 14, 1970, issue used a blow-up of George Washington's portrait from a one dollar bill to illustrate a story about inflation. (A copy of this picture is annexed to the Complaint as Exhibit A, and is annexed to the accompanying Schwarz affidavit as Exhibit 4.) This depiction of currency was obviously not true to size, and was also altered by exaggerating the green color, adding a teardrop in Washington's cheek, and superimposing the words "Worth 73¢". Similarly, the February 23, 1976, TIME cover depicted a $1,000 note being passed from one hand to another to illustrate a story on international bribery. (A copy of this cover is annexed to the Complaint as Exhibit C and to the accompanying Schwarz affidavit as Exhibit 6.) Again, the note was partly obscured by the addition of a cartoon thumb. Finally, the November 1, 1976, TIME cover showed several bills of small denominations, clutched in someone's hand, to illustrate a story emphasizing the role of inflation as a major campaign issue. (A copy of this cover is annexed to the Complaint as Exhibit D and to the accompanying Schwarz affidavit as Exhibit 7.) The photographer's decision to show the hand grabbing these well-worn bills very tightly successfully emphasized the inflation squeeze for most citizens. Yet although the pictures of money were significantly distorted on all of these covers, I am informed that TIME was told by the Secret Service that in using them the magazine had violated the anticounterfeiting laws.

8. It is also useful to note that in the case of money, as with other everyday symbols, artistic distortion is often needed to correspond to imagined reality. Although the front of a dollar bill or any other piece of United States paper currency is mostly black and white, with some green and occasionally some red, people *think* of money as green. And the Court will notice that in 2 of the 3 examples listed above—the picture of Washington

and the tightly-held bills—the green colors in the illustrations were quite exaggerated. This slight distortion of reality was useful to produce images more striking than accurately colored representations would have been.

9. A final point further demonstrates why the use of currency illustrations by TIME's artists cannot create any practical danger to the public. The process of making magazines and the process of making money are so fundamentally different from each other that the tools used in four-color magazine printing would be useless to someone desiring to counterfeit currency. The color positives used by TIME to produce covers are merely photographs of money—and anyone can take a picture of a dollar bill without using TIME's pictures. The four-color plates used by TIME are also worthless to the would-be counterfeiter—individually they are worthless, because all four are needed to reproduce the colors, and even if one had access to all four plates, all one could produce would be a TIME cover. It would have the TIME logo, the date, and the printed overlays, as well as, for example, the tear in George Washington's eye as in our December 14, 1970, cover, or the graphic illustration of a thumb over the thousand dollar bill of our February 23, 1976, cover. And although to my knowledge TIME has never printed a cover depicting unaltered, unobscured, true-to-size, true-color currency, even if such a cover existed, the plates used to make it would be useless to the aspiring counterfeiter because they would be four-color offset plates, not engraving plates. In short, to reproduce engraved currency, access to TIME's four-color plates rather than engraving plates does nothing for a counterfeiter.

/s/ RUDOLPH HOGLUND
Rudolph Hoglund

[Subscribed and sworn to
July 17, 1981.
(Jurat omitted in printing)]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TIME INCORPORATED,
Plaintiff,

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY,
Et Al.,
Defendants.

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81 Civ. 3218 (VLB)

AFFIDAVIT OF RONALD N. CAMPBELL

(filed July 21, 1981)

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

RONALD N. CAMPBELL, being duly sworn, deposes and says:

1. I am the Art Director of FORTUNE Magazine, a Time Inc. publication. I submit this affidavit in support of plaintiff's motion for summary judgment to set forth some of the reasons why the right to publish illustrations of currency is important to FORTUNE, and to discuss two recent examples which demonstrate both the journalistic value of this particular symbol and the constraints imposed by the criminal law challenged in this lawsuit.

2. I joined the FORTUNE Art Department in 1952 and became Art Director in 1974. Prior to that I had been Associate Art Director. I am a member of the Society of Illustrators and the Honorary Board of the Society of Publication Designers, and have won numerous awards for my work.

The Importance to FORTUNE of Graphic Representations of Currency

3. FORTUNE's editorial content places special emphasis on the economy and the financial affairs of the business world. Our magazine is devoted principally to the presentation of news, analysis and commentary concerning economic and financial matters, and developments in domestic and international business affairs.

4. FORTUNE attempts to bring an added dimension to its stories through graphic designs which complement the text and attract the attention of readers. When our text concerns certain issues relating to money, the best graphic device to symbolize and convey the message of the text is often an illustration of money itself. Because the uses and influence of money are so central to our subject matter, to deny FORTUNE the opportunity to use color depictions of currency is to eliminate an extremely valuable tool of our trade. The value of this uniquely versatile symbol to FORTUNE is perhaps best revealed by considering two artistic uses of currency illustration, prepared under my direction, which were said to be forbidden by the Federal law.

Two Examples of the Value of Currency Illustration to FORTUNE and the Foolishness of the Prohibitions

5. In February 1979, FORTUNE ran a major story on "America's Invisible Rich". The cover for that issue portrayed a stack of paper money folded within a gold Buccellati horseshoe-shaped money clip inlaid with diamonds. The bill on top—the only Note visible—was a $1,000 bill, of which about one-third of the reverse side was shown. (A copy of this cover is attached to the accompanying Schwarz Affidavit as Exhibit 10.) I believe that this illustration, which was intended to suggest that some people in the United States carry $1,000 bills in their pockets as routinely as most of us carry singles, captured and conveyed the message of the story with outstanding impact and clarity. Yet, even though the illustration showed only a small fraction of an uncommonly large bill, blown up to more than five times actual size, and largely

covered by the horseshoe money clip. I am told we were accused of violating the Federal anticounterfeiting laws by publishing it.

6. A second example reveals how the Federal law has frustrated our objectives as journalists. In 1977 FORTUNE ran a story about a certain company whose "cash rich" position created opportunities closed to other firms, but required the company to make wise investments in order to maintain its earnings record in the future. To capture the essence of the difficult choices confronting that firm, our Art Department designed a photograph depicting a "landscape" of distorted blow-ups of $100 Federal Reserve Notes leading to a series of open doors set against the sky. (A copy of this illustration is attached to the accompanying Schwarz Affidavit as Exhibit 2.) In our judgment, the photograph was extremely effective—but we were advised by the Treasury Department that we couldn't use it because it would violate the Federal anticounterfeiting law. We therefore changed the illustration, using coins instead of bills to create the "landscape". (A copy of the substituted illustration is annexed to the Schwarz Affidavit as Exhibit 3.) I believe the journalistic and artistic purposes of the picture were largely defeated as a result of that change: a company is not understood by our readers to be cash rich if it counts its wealth in coins. Because the message of our article was contradicted by the message of the accompanying photograph, the journalistic impact of the graphics was undermined by the Government's censorship.

/s/ RONALD N. CAMPBELL
Ronald N. Campbell

[Subscribed and sworn to
July 17, 1981.
(Jurat omitted in printing)]

[Affidavit of Service of this and the five preceding affidavits omitted in printing.]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TIME INCORPORATED,
Plaintiff,

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY,
Et Al.,
Defendants.

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81 Civ. 3218 (VLB)

AMENDED ANSWER

(filed August 28, 1981)

Defendants Donald T. Regan, William French Smith, James D'Amelio, H. Stuart Knight, and John S. Martin, Jr., by their attorney, John S. Martin, Jr., United States Attorney for the Southern District of New York, answer as follows upon information and belief the numbered paragraphs of the Complaint herein:

1. Deny, except admit that plaintiff seeks to bring the described action pursuant to the statutes alleged.

2-7. Admit.

8. Deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 8.

9. Admit that on the stated dates plaintiff's publications have included illustrations of United States obligations or portions thereof. Defendants respectfully refer the court to the cited magazine covers for the nature of the illustrations and for a determination as to their purposes.

10. Admit that chapter 25 of title 18 is a penal statute. Defendants respectfully refer the court [to] the cited statutes for their content and purposes.

11. Admit that 18 U.S.C. § 474 ¶6 exists and is interpreted by defendants to mean what it says. Defendants object to plaintiff's characterizations of the statute and deny plaintiff's interpretations thereof.

12. Admit that defendants interpret 18 U.S.C. §474 ¶6 on the basis of its content except aver that when read in concert with 18 U.S.C. §504 ¶6 does not prohibit the expression of information, opinions or ideas through the use of United States currency: section 504 sets forth specific criteria which such illustrations must fulfill in order to be lawful. Admit that plaintiff faces a non-specific possibility of prosecution and forfeiture for continued violation of 18 U.S.C. §474. Defendants aver that plaintiff has been advised that certain illustrations of currency which have appeared in its publications are in violation of section 474 thereby subjecting plaintiff to a possibility of prosecution, but defendants deny that any threats of prosecution have been made.

13. Admit, except respectfully refer the court to the cited statute for its contents.

14. Admit that the quoted words are not specifically defined in the statute but aver that their meaning is clear on the face of the statute. Defendants respectfully refer the court to the cited statute for the contents thereof. Defendants aver that the risk of "sanctions" encountered by the plaintiff turns on the judgment of the courts as is true with the interpretation of all

criminal statutes. Defendants admit that in the opinion of the Department of the Treasury section 504 prohibits illustrations used primarily for decorative or eye-catching purposes and also requires that an illustration permitted by the section be accompanied by numismatic, educational, historical or newsworthy information relating directly to the item that is illustrated. Deny the defendants' construction of the statute exceeds the scope of its prohibition.

15. Deny, except admit that the Secret Service has had contact with plaintiff concerning various possible violations of section 474 and advised plaintiff that in the opinion of the Department of the Treasury certain reproductions of United States obligations were in violation of the law.

16-19. Deny.

FIRST AFFIRMATIVE DEFENSE

The complaint fails to state a claim for which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

This court lack[s] subject matter jurisdiction to entertain this action.

THIRD AFFIRMATIVE DEFENSE

This case does not present a justiciable case or controversy.

Except as hereinbefore expressly admitted or denied, defendants deny knowledge or information sufficient to form a belief as to the truth of each and every allegation of the complaint.

WHEREFORE, defendants respectfully demand judgment dismissing the complaint and awarding defendants their costs and such other and further relief as is just or proper.

Dated: New York, New York
August 27, 1981

JOHN S. MARTIN, JR.
United States Attorney for the
Southern District of New York

By: /s/ TWILA L. PERRY

Twila L. Perry
Assistant United States Attorney
Office and Post Office Address
One St. Andrew's Plaza
New York, New York 10005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TIME INCORPORATED,
Plaintiff,

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY,
Et Al.,
Defendants.

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81 Civ. 3218 (VLB)

SUPPLEMENTAL AFFIDAVIT OF FREDERICK A. O. SCHWARZ, JR.

(filed September 29, 1981)

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

FREDERICK A. O. SCHWARZ, JR., being duly sworn, deposes and says:

1. I am a member of the firm of Cravath, Swaine & Moore, attorneys for plaintiff Time Inc. ("Time"). I submit

this supplemental affidavit in support of plaintiff's motion for summary judgment, (a) to set forth facts relating to a television news broadcast aired after the filing of this motion, which further reveals the irrationality of the challenged Federal statutes; and (b) to comment, as a practicing member of the Bar, on defendants' thesis that a publisher accused of crime by Federal law enforcement agents must await prosecution before it is allowed to challenge the constitutionality of the law that criminalizes its editorial material.

The Irrational Distinction Between Film and Print: The WNEW-TV News Broadcast of July 29, 1981, and SPORTS ILLUSTRATED's "Point-Shaving" Story

2. As has been more fully described in my previous Affidavit of July 20, 1981, and in the Affidavit of Gilbert Rogin dated July 17, 1981, SPORTS ILLUSTRATED magazine—a periodical published by plaintiff—featured in its February 16, 1981 issue an exclusive story about a "point-shaving" scandal in college basketball, as recounted by the scheme's mastermind, Henry Hill. For reasons Mr. Rogin has explained, the editors and art directors of SPORTS ILLUSTRATED chose to highlight that story on the cover of the February 16 issue by means of a photographic reproduction in color of portions of many dozens of $100 bills, reduced to approximately one-third actual size, overlapping each other and stuffed inside or descending into a basketball hoop and attached net. (A copy of that cover is annexed to the Complaint herein as Exhibit F, and to my previous Affidavit as Ex. 11.) On May 18, 1981, shortly before this action was commenced, Time was advised by an agent of the Secret Service that in the opinion of the Department of the Treasury, SPORTS ILLUSTRATED's February 16 cover violated the Federal anticounterfeiting laws; that the plates and other materials involved in its production must be seized; that the names and addresses of all persons involved in the preparation of the cover must be delivered to the Service; and that the agent wished to question a member of Time's management in the presence of counsel.

3. Almost immediately after the submission of plaintiff's motion papers, the Boston College "point-shaving" scandal was covered by the broadcast media in a manner which confirms SPORTS ILLUSTRATED's judgments as to both the importance of the story to the public and the most effective means of conveying it. Thus, on July 29, 1981, the sports news broadcast of the Ten O'Clock News on WNEW-TV featured a report of the indictment, earlier that day, of five persons allegedly connected with the "point-shaving" scandal. (A script of the broadcast, prepared by Radio TV Reports, Inc., 44 East 42nd Street, New York, N.Y. 10017, is annexed hereto as Exhibit A.) To illustrate their own story of the latest developments in the scandal, the editors of WNEW-TV chose none other than the allegedly criminal cover of the February 16, 1981, issue of SPORTS ILLUSTRATED magazine.

4. As Messrs. Chris Jones and Bob O'Brien read on the air the news of the day's indictments for racketeering and sports bribery, *see* Ex. A, p. 2, the camera slowly scanned SPORTS ILLUSTRATED's dramatic picture of the basketball net filled with money; focused briefly on some portraits and an artist's sketch of the courtroom; and returned to SPORTS ILLUSTRATED's cover for the close. Hence, in the medium admittedly favored with far greater capability for gripping visual expression than a printed magazine, the most compelling means of conveying the essence of a story about money was adjudged by its own journalists to be SPORTS ILLUSTRATED's picture of money itself.

5. Ironically, although it was allegedly a crime for SPORTS ILLUSTRATED to publish the illustration shown on its February 16, 1981 cover, it was *not* unlawful for WNEW to show SPORTS ILLUSTRATED's allegedly unlawful cover on the air. Under Title 18, U.S.C. § 504(2), the broadcast media are broadly exempted from the prohibitions of Title 18, U.S.C. § 474, and permitted to use films and slides depicting illustrations of United States currency, in all sizes and colors, for all purposes except advertising.

6. Plaintiff submits that in addition to all its other constitutional infirmities, a Federal law which creates such an irrational distinction between criminal and noncriminal conduct cannot be sustained under the Constitution.

Defendants' Thesis of "Justiciability"

7. In response to plaintiff's motion for summary judgment, defendants have taken the position that plaintiff has failed to present a constitutional "controversy", notwithstanding the undisputed history of harassment and accusation Time has suffered at the hands of the Secret Service and the Treasury Department. The reasons why this contention is unsupportable as a matter of law are set forth at pp. 32-39 of plaintiff's supplemental memorandum in support of its motion. In addition, however, I wish to call the Court's attention to the anomalous posture in which members of the Bar would be cast if defendants' argument were deemed to bear any merit.

8. As set forth in detail in my previous Affidavit, my client has been routinely berated by Federal law enforcement officials for engaging in a form of expression which it deems essential to the proper exercise of its role as a member of the press, and believes to be protected by the United States Constitution. No member of any relevant Federal agency—including, now, the Department of Justice and the Office of the United States Attorney—has ever taken the position that this form of expression is *not* a crime for which Time may be prosecuted. Indeed, in the course of our discussions respecting the briefing schedule for this motion, counsel for defendants expressly declined to agree that Time would not be prosecuted even during the pendency of this action.

9. As further indicated in my previous Affidavit, in view of the increasing importance to Time of the photographs and artwork at issue, and in view of Time's increasing concern about the jeopardy to its employees, I advised Time to commence this lawsuit, to clarify the fact that defendants cannot constitutionally interfere with the editorial content of its publi-

cations. The only conceivable alternative—to cease printing illustrations that Time wishes and needs to print, so long as these statutes remain in the United States Code—was necessarily rejected as an untenable course.

10. Defendants now suggest that there was, in fact, a third course. If their theory of constitutional adjudication is accurate, the proper advice to Time was to continue in a course of conduct Federal officers have labelled criminal, and await the opportunity for vindication at the pleasure of the Justice Department—*after* Time was indicted, its property seized, and its employees very probably deprived of their liberty.

11. It cannot be the calling of a lawyer in our system to counsel disregard for the advice and warnings of officers of the Federal Government. Nor can it be the calling of a lawyer to counsel sacrifice of rights secured by the Constitution. As I understand it, the responsibility to identify the lines of demarcation between governmental power and individual right is one of the central missions of the judiciary; my role as a lawyer compels me to counsel anyone who asks that the proper redress for individual wrong lies in recourse to the courts.

/s/ FREDERICK A. O. SCHWARZ, JR.
Frederick A. O. Schwarz, Jr.

[Subscribed and sworn to
September 29, 1981.
(Jurat omitted in printing)]

[Affidavit of Service omitted in printing.]

Exhibit A to Supplemental Schwarz Affidavit

[Letterhead omitted in Printing]

FOR
DRESSEL & ALTMAN

PROGRAM
TEN O'CLOCK NEWS

STATION
WNEW-TV

DATE
JULY 29, 1981, 10:00 P.M.

CITY
NEW YORK

BROADCAST EXCERPT

CHRIS JONES: For anyone who bets on sports, it is not who wins or who loses. It's by how much that counts. That's because the amount of money you win or lose, actually whether you win or lose or not, depends on the amounts of points separating the winning and losing teams. If you bet on sports, you know what I am talking about.

In basketball, that spread can be fixed by a few poorly-aimed shots. Today, five men, one a former Boston College basketball star, were indicted on charges they tried to fix some college basketball games.

BOB O'BRIEN: In January of this year, word got out that Federal lawmen were digging into possible point-shaving during the 1978-'79 season at Boston College. Then in February, the man who admits to masterminding the scheme told how he did it in a cover article in Sports Illustrated magazine.

Henry Hill says he paid three Boston College basketball players about ten thousand dollars each to shave points in nine games. Hill claims he raked in close to 100 thousand dollars betting on those games, and his associates made over a quarter million. Hill named Rick Kuhn as the first player to join the fix and said that Kuhn got teammate Jim Sweeney involved from the start and later convinced Boston College star guard, Ernie Cobb, to take part in the caper.

Hill did all this fancy story-telling after becoming a government informer, following his arrest on drug charges in 1980. Hill is also said to be one of the masterminds of the 1978 heist at the Lufthansa cargo terminal at Kennedy Airport that netted thieves six million dollars in cash and jewels.

Another reputed Lufthansa mastermind, James "Jimmy the Gent" Burke, was one of the five indicted today in the point-shaving case. Rick Kuhn was the only one of the Boston Colleges players named in the Sports Illustrated article who was charged today with racketeering and sports bribery.

KEN WALTON (F.B.I.): Two men met in jail, Henry Hill and James Burke. This was prior to 1978. When Hill got out of jail, he went and looked up Burke, who was in Pittsburgh. Burke at that time was a friend of a guy by the name of Paul Mazey. Mazey, in turn, was connected, through friendship, with two other individuals by the name of Tony and Rocco Polla. One of the Polla brothers had played—had gone to school with Rich Kuhn, a player on the Boston College basketball team. They all got together and said there is a way to make money, and the way to make money is to shave points.

O'BRIEN: So what of the other two players informant Hill claims he paid off to shave points. Team co-captain Jim Sweeney reportedly was granted immunity from prosecution and testified before the Federal grand jury investigating the alleged schemes. Ernie Cobb, now touring with the Harlem Wizards, reportedly is still a target of the Federal probe. Lawmen hope that Henry Hill will be their star witness when the case comes to trial. To make sure he survives in the interim, the F.B.I. has given Hill a new identity and a place to hide out, under the Federal witness protection program.

Bob O'Brien, Channel 5 News.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TIME INCORPORATED,
Plaintiff,

v.

DONALD T. REGAN, Secretary of the Treasury, H. STUART KNIGHT, Director, United States Secret Service, WILLIAM FRENCH SMITH, Attorney General of the United States, JAMES R. D'AMELIO, Special Agent in Charge, New York Field Office, United States Secret Service, JOHN S. MARTIN, JR., United States Attorney for the Southern District of New York,
Defendants.

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81 Civ. 3218 (VLB)

OPINION

(Filed June 4, 1982)

VINCENT L. BRODERICK, U.S.D.J.

[Appearances omitted]

I.

This civil action, in which plaintiff seeks declaratory and injunctive relief, involves a challenge to the constitutionality of

two provisions of the federal anti-counterfeiting laws that either prohibit or regulate the publication or production of any likeness of United States currency. Jurisdiction of this court rests on 28 U.S.C. § 1331, as amended Dec. 1, 1980, Pub.L. 96-486, § 2(a), 94 Stat. 2369. Declaratory relief is sought under 28 U.S.C. §§ 2201 and 2202 (1976).[1]

Plaintiff Time Inc. ("Time") is a New York corporation with its principal place of business in New York City. It publishes various periodicals—*Time, Fortune, Sports Illustrated, Life, Money, People,* and *Discover.*[2] Defendants are

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[1] 28 U.S.C. § 2201, captioned "Creation of remedy," provides that:

> In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2202, captioned "Further relief," provides that:

> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

Both sections are procedural in nature, designed to simplify the ascertainment of uncertain rights, *Coomes* v. *Adkinson,* 414 F.Supp. 975 (D.S.C. 1976), and neither serves as an independent predicate for federal court jurisdiction. *Donahue* v. *Butz,* 363 F.Supp. 1316 (N.D. Cal. 1973). Sections 2201 and 2202 may be resorted to for additional remedies in situations where jurisdiction already exists. *Terminal Freight Handling Co.* v. *Solien,* 444 F.2d 699 (8th Cir. 1971), *cert. denied,* 405 U.S. 996 (1972). Plaintiff properly invokes §§ 2201 and 2202 as there exists an independent basis for jurisdiction, namely 28 U.S.C. § 1331.

[2] *Fortune* and *Money* focus primarily on matters pertaining to finance and the economy, while the other magazines report from time to time on financial matters and issues (*Time* and *Life*), or may refer from time to time to such matters and issues in the course of treating the areas in which they specialize (*Sports Illustrated, People,* and *Discover*).

various United States Government officials who are statutorily charged with the administration and enforcement of the counterfeiting laws of the United States.[3]

Plaintiff alleges that the challenged provisions are overbroad and void for vagueness, and that they impermissibly infringe upon plaintiff's First Amendment rights of freedom of speech and of the press.[4] Plaintiff has moved and defendants have cross-moved for summary judgment. Fed.R.Civ.P. 56.

II.

The United States Constitution grants Congress broad power to legislate to "coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures," art. I, § 8, cl. 5, and to "provide for the Punishment of counterfeiting the Securities and current Coin of the United States." art. I, § 8, cl. 6. The power to coin money has been long recognized as carrying the correlative power to protect it. *United States* v. *Marigold*, 50 U.S. 560, 9 How. 560 (1850). The *Marigold* Court upheld an Act of Congress, 4 Stat. at Large

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[3] Donald T. Regan is Secretary of the United States Department of the Treasury, responsible for the enforcement of the laws of the United States which define, and provide for the punishment of, counterfeiting and forgery of United States currency. H. Stuart Knight is Director of the United States Secret Service, a division of the Department of the Treasury, and is responsible for the detection and arrest of persons who violate federal counterfeiting laws. William French Smith is the Attorney General of the United States, responsible for the administration of the United States Department of Justice, including its activities with respect to the nation's penal laws. James R. D'Amelio is Special Agent in Charge of the New York Field Office of the United States Secret Service. John S. Martin, Jr. is the United States Attorney for the Southern District of New York.

[4] The First Amendment to the United States Constitution reads as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

121, ch. 65, providing for the prosecution of those involved in counterfeiting any coin in the resemblance of United States currency.

Chapter 25 of Title 18 of the United States Code contains those laws which prohibit the alteration, counterfeiting or forgery of the coins, obligations and securities of the United States Government and of foreign governments, and which provide criminal sanctions with respect to such activities.

This case involves the impact of two of the provisions of Chapter 25—the sixth paragraph of § 474, and § 504.

1. 18 U.S.C. §474.

18 U.S.C. § 474 (1976) is one of 39 sections in Chapter 25, and is captioned "Plates or stones for counterfeiting obligations or securities."[5] Paragraphs one through five and paragraph

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[5] 18 U.S.C. § 474 reads as follows:

> Whoever, having control, custody, or possession of any plate, stone, or other thing, or any part thereof, from which has been printed, or which may be prepared by direction of the Secretary of the Treasury for the purpose of printing, any obligation or other security of the United States, uses such plate, stone, or other things, or any part thereof, or knowingly suffers the same to be used for the purpose of printing any such or similar obligation or other security, or any part thereof, except as may be printed for the use of the United States by order of the proper officer thereof; or
>
> Whoever makes or executes any plate, stone, or other thing in the likeness of any plate designated for the printing of such obligation or other security; or
>
> Whoever sells any such plate, stone, or other thing, or brings into the United States any such plate, stone, or other thing, except under the direction of the Secretary of the Treasury or other proper officer, or with any other intent, in either case, than that such plate, stone, or other thing be used for the printing of the obligations or other securities of the United States; or
>
> Whoever has in his control, custody, or possession any plate, stone, or other thing in any manner made after or in the similitude of any plate, stone, or other thing, from which any such obligation or other security has been printed, with intent to use

seven of § 474 criminalize the possession, use, importation, sale and forgery of materials which can actually be used for counterfeiting purposes, such as plates, stones and paper. The sixth paragraph of § 474, one of the provisions challenged herein, makes it a crime to create a photograph, print or impression of "any obligation or other security made or executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States":

* * *

Whoever prints, photographs, or in any other manner makes or executes any engraving, photograph, print, or impression in the likeness of any such obligation or other

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such plate, stone, or other thing, or to suffer the same to be used in forging or counterfeiting any such obligation or other security, or any part thereof; or

Whoever has in his possession or custody, except under authority from the Secretary of the Treasury or other proper officer, any obligation or other security made or executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same; or

Whoever prints, photographs, or in any other manner makes or executes any engraving, photograph, print, or impression in the likeness of any such obligation or other security, or any part thereof, or sells any such engraving, photograph, print, or impression, except to the United States, or brings into the United States, any such engraving, photograph, print, or impression, except by direction of some proper officer of the United States; or

Whoever has or retains in his control or possession, after a distinctive paper has been adopted by the Secretary of the Treasury for the obligations and other securities of the United States, any similar paper adapted to the making of any such obligation or other security, except under the authority of the Secretary of the Treasury or some other proper officer of the United States—

Shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both.

June 25, 1948, ch. 645, 62 Stat. 706.

> security,[6] or any part thereof, or sells any such engraving, photograph, print, or impression, except to the United States, or brings into the United States, any such engraving, photograph, print, or impression, except by direction of some proper officer of the United States;
>
> • • •
>
> Shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both.

18 U.S.C. § 474 ¶ 6.

Section 474 traces its roots to Section 11 of "An Act to provide Ways and Means for the Support of the Government, and for other Purposes," ch. 172, 13 Stat. 218, 221-222, which was enacted on June 30, 1864.

Drafted as a measure to raise money for the War Between The States, the Act provided, *inter alia*, for the issuance of various federal obligations, and it set forth penal provisions with respect to the counterfeiting and forgery of federal obligations. Thus Section 10 of the Act provided criminal sanctions against the forgery, counterfeiting or alteration of United States obligations and the passing or uttering of counterfeits. Section 12 made it a federal crime to possess without lawful authorization "any engraved or transferred plate, block, or electrotype" from which U.S. obligations were or would be made; or any die, roll, or original work used in the making thereof; or any materials made "after the similitude" thereof.

Section 11 of the 1864 Act is the ancestor of Section 474. The sixth paragraph of Section 474 traces its genesis to the following language of Section 11:

> . . . if any person shall print, photograph, or in any other manner make or execute, or cause to be printed, photo-

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[6] The antecedent of the words "any such obligation or other security" in the sixth paragraph of Section 474 appear in the fifth paragraph of Section 474, and are quoted in this opinion immediately before the text of the sixth paragraph. *See* fn. 5, *supra*, for full text of Section 474.

> graphed, or in any manner made or executed, or shall aid in printing, photographing, making, or executing any engraving, photograph, or other print or impression in the likeness or similitude of any obligation or other security, or any part or parts thereof, or shall vend or sell any such engraving, photograph, print, or other impression, except to the United States, or shall bring into the United States from any foreign place any such engraving, photograph, print, or other impression, except by the direction of some proper officer of the United States . . . every person so offending shall be deemed guilty of a felony, and shall, on conviction thereof, be punished by fine not exceeding five thousand dollars, or by imprisonment and confinement at hard labor, not exceeding fifteen years, or by both, in the discretion of the court.

The proceedings of the 38th Congress shed virtually no light on its intent with respect to the anti-counterfeiting sections of the 1864 Act. The sole reference to § 11 in the course of the House pre-enactment consideration of the Act pertained to a modification of the sentence and fine provisions, which was made. There was apparently no significant discussion of § 11 in the Senate.

But Section 11 of the statute passed in 1864 to help finance the Union in the War Between the States is, in substance, the law of the United States today. With minor changes in language, it was re-enacted as § 5430 of the Revised Statutes of 1878, Tit. LXX, ch. 5, Rev. Stat. 1052 (December 1, 1878), and re-enacted again as § 150 of the codification of 1909, ch. 321, 35 Stat. 1116 (March 4, 1909). As revised in 1909, the substance of Section 11 made its way through the first three editions of the United States Code; it was re-enacted once again with minor changes in phraseology in the 1946 recodification of the penal laws, *see* ch. 645, 62 Stat. 706 (1948), and appears in that form in Section 474 of Title 18.

2. 18 U.S.C. § 504.

18 U.S.C. § 504 (1976), which is the second provision challenged in this action, was substantially amended in 1958 to

provide certain statutory exemptions to the flat ban of § 474. Notwithstanding the prohibitions contained in the sixth paragraph of § 474, § 504 permits the printing or publishing "of illustrations" of United States currency "for philatelic, numismatic, educational, historical, or newsworthy purposes in articles, books, journals, newspapers or albums." Such illustrations must be "in black and white", and they must be "of a size less than three-fourths or more than one and one-half, in linear dimension," of the currency illustrated. Excepted from these requirements are motion-picture films, microfilms or slides for screen projection or telecasting.[7]

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[7] 18 U.S.C. 504, captioned "Printing and filming of United States and foreign obligations and securities," reads as follows:

> Notwithstanding any other provision of this chapter, the following are permitted:
>
> (1) the printing, publishing, or importation, or the making of importation of the necessary plates for such printing or publishing, or illustrations of—
>
> (A) postage stamps of the United States,
>
> (B) revenue stamps of the United States,
>
> (C) any other obligation or other security of the United States, and
>
> (D) postage stamps, revenue stamps, notes, bonds, and any other obligation or other security of any foreign government, bank, or corporation,
>
> for philatelic, numismatic, educational, historical, or newsworthy purposes in articles, books, journals, newspapers, or albums (but not for advertising purposes, except illustrations of stamps and paper money in philatelic or numismatic advertising of legitimate numismatists and dealers in stamps or publishers of or dealers in philatelic or numismatic articles, books, journals, newspapers, or albums). Illustrations permitted by the foregoing provisions of this section shall be made in accordance with the following conditions—
>
> (i) all illustrations shall be in black and white, except that illustrations of postage stamps issued by the United States or by any foreign government may be in color;
>
> (ii) all illustrations (including illustrations of uncanceled postage stamps in color) shall be of a size less than three-fourths or more than one and one-half, in linear dimension, of each part of any matter so illustrated which is covered by subparagraph (A), (B), (C), or (D) of this

The legislative history indicates that Congress intended in § 504 merely to institutionalize the practices of the Treasury Department:

> The Secretary of the Treasury, under the authority vested in him by title 18, United States Code, section 474, has normally as a matter of practice for many years made exceptions to the statute by granting special permission to use illustrations of United States bonds and paper money for numismatic, historical, and educational purposes. To prevent any possibility of the illustrations being used as an instrument of fraud, such special permission has been limited to the use of black-and-white illustrations less than three-fourths or more than 1½ times the size of the genuine paper money.
>
> It is the opinion of the Treasury Department that the printing in publications of black-and white illustrations of

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paragraph, except that black and white illustrations of postage and revenue stamps issued by the United States or by any foreign government and colored illustrations of canceled postage stamps issued by the United States may be in the exact linear dimension in which the stamps were issued; and

(iii) the negatives and plates used in making the illustrations shall be destroyed after their final use in accordance with this section.

(2) the making or importation, but not for advertising purposes except philatelic advertising, of motion-picture films, microfilms or slides, for projection upon a screen or for use in telecasting, of postage and revenue stamps and other obligations and securities of the United States, and postage and revenue stamps, notes, bonds, and other obligations or securities of any foreign government, bank, or corporation. No prints or other reproductions shall be made from such films or slides, except for the purposes of paragraph (1), without the permission of the Secretary of the Treasury.

For the purposes of this section the term "postage stamp" includes postage meter stamps.

June 25, 1948, ch. 645, 62 Stat. 713; Sept. 2, 1958, Pub.L. 85-921, § 1, 72 Stat. 1771; June 20, 1968; Pub.L. 90-353, § 1, 82 Stat. 240; Oct. 14, 1970, Pub.L. 91-448, § 2, 84 Stat. 921.

> paper money and other obligations and securities of the United States restricted in size will not facilitate counterfeiting. Paragraph (1) of section 504 of the United States Code, as it would be amended by the bill, will specifically permit such illustrations for numismatic, educational, historical, and newsworthy purposes and will obviate the necessity of obtaining special permission from the Secretary of the Treasury in each case where the use of such illustrations is desired. A provision is included to require that the negatives and plates used in making the illustrations shall be destroyed after their final use for the purpose for which they were made. Such a requirement has formerly been imposed in cases where the Secretary of the Treasury has granted special permission as a precautionary measure and to avoid investigations of alleged violation where plates and negatives were legitimately made but were merely discarded instead of being destroyed.

S. Rep. No. 2446, 85th Cong., 2d Sess., reprinted in [1958] U.S. Code Cong. & Ad. News 5268, 5272.

III.

Plaintiff contends that the sixth paragraph of § 474, and § 504, prohibit plaintiff and others from using illustrations of money as vehicles for the expression of opinions and ideas, except in accordance with narrow and arbitrarily defined criteria. It further contends that under the criteria set forth in these provisions the Government has the power, which it freely exercises, to determine if given material, i.e., illustrations or likenesses of U.S. currency, in a newspaper or magazine qualifies as news. It submits that in light of the adverse impact which these statutes have on the plaintiff's right of free speech and right freely and without restriction to publish and comment upon the news, they are unconstitutional on their face, and as applied to the activities of plaintiff.

More specifically, plaintiff contends that illustrations of money serve as powerful symbols in countless contexts in the

reporting of, and in commentary on, the news and in the free exchange of ideas; that absent some compelling governmental need the use of such symbolic illustrations may not constitutionally be curtailed; that even if some compelling governmental need were identified, the constraints upon the use of illustrations of money for symbolic purposes in public reporting and discourse must be narrowly crafted to serve that need with the minimal possible impact upon freedom of speech and of the press; and that no constitutionally cognizable compelling governmental need can be identified with respect to the challenged provisions.

The defendants contend that the sixth paragraph of § 474, and § 504, constitute reasonable exercises of the power of the government to prevent counterfeiting and to preserve and maintain the integrity of the currency system of the United States, and that they are constitutional facially and as applied to plaintiff. They assert that the restrictions imposed by the statutory scheme are directed not to the content of the articles which plaintiff seeks to illustrate, but to the manner or style in which money is illustrated, and that those restrictions are minimal. They maintain that the First Amendment does not guarantee to plaintiff the right to illustrate money as a symbol in precisely the manner plaintiff happens to consider most effective.

Defendants also challenge the existence of any case or controversy between plaintiff and defendants.

IV.

The material facts, summarized in this section, are not in dispute.

Illustrations of money are used by plaintiff as symbols. Within the past fifteen years, plaintiff's magazines have at various times utilized illustrations, photographic or otherwise, of United States currency to symbolize the toll of inflation, to represent the economic issues at stake in a presidential election, to comment upon political scandals, and to convey information

or commentary upon matters ranging from the place of the American dollar in international commercial markets to point-shaving scandals in amateur basketball. On many of these occasions some representative of the Treasury Department has warned plaintiff that specified illustrations violated Chapter 25 of Title 18.

The illustrations depict money in undersize or oversize, and they distort it. Since they appear on only one side of a printed page, the illustrations show at most only one side of any currency depicted.

1. The December 14, 1970 front cover of *Time* featured a photographic reproduction in color of approximately one-quarter of the face of a $1 federal reserve note, blown up five times and partially obscured by red printed legends. The illustration related to a story appearing in the magazine about inflation. About a month after publication, an agent of the Secret Service advised Time's production department that the illustration was illegal on the ground that federal law barred publication of any likeness of currency in color. He warned that Time must cease and desist from further violations.

2. An inside page of the July 29, 1974 issue of *Time* bore a photographic reproduction, in black and white, of approximately one-half of the face of a $1 bill, substantially obscured by an overlay of a life preserver. The illustration accompanied an essay on "How to Mobilize Against Inflation." About two months after publication, a Secret Service agent visited an attorney in Time's legal department and advised him that the illustration violated § 504, which barred any black-and-white illustration that was not less then three-quarters nor more than one and one-half times actual size. The agent warned that Time must cease and desist from further violations.

3. On the February 23, 1976 front cover of *Time* appeared a photographic reproduction in black and white of a $1000 bill, substantially obscured by an overlaid printed legend and by an overlaid graphic design. The illustration related to a story

within the magazine entitled "The Big Payoff," concerning allegations of international bribery by an American aircraft firm. In a letter dated February 24, 1976 the assistant legal counsel to the director of the Secret Service notified Time that in the opinion of the Department of the Treasury, the cover illustration violated § 504. The letter set forth that to qualify under § 504 the illustration must not only meet the size requirements but must "appear in articles, books, journals, newspapers, or albums for historical, educational, numismatic or newsworthy purposes." The letter further stated that "[t]he Department has taken the position that in order for an illustration to be permissible it must be accompanied by information about the particualr [sic] item reproduced and cannot be used for decorative or eye-catching purposes." On February 25, 1976 Secret Service agents visited Time's legal department to warn that Time must cease and desist from further violations.

4. The November 1, 1976 front cover of *Time* carried a photographic reproduction in color of $1, $10, and $20 bills clutched in a human hand. The bills were folded lengthwise, and photographically reduced to less than one-half actual size. With repect to most of the photographed bills, only a part of an outside border, or the border and a fragment of a single numeral, was visible. The legend, "Voting Your Pocketbook," was splashed across the bottom of the cover. The illustration bore upon the impending Presidential election and the impact of inflation on voting trends, which was the subject of a story within the magazine. The assistant legal counsel to the Secret Service notified Time's legal department by letter dated November 18, 1976 that the color illustration violated § 474. The letter reviewed previous warnings which had been given to plaintiff, including those with respect to the July 29, 1974 and February 23, 1976 issues of *Time*, and advised plaintiff "to cease and desist from the use of any future reproductions of currency appearing in color. . ." The letter warned: "If Time, Incorporated fails to comply with this request, we will refer the matter to the United States Attorney's office in the Southern District of New York for appropriate action."

5. *Fortune's* February 12, 1979 front cover photographically reproduced, in color, federal reserve notes enclosed within a money clip. The notes were folded twice widthwise, and enlarged to more than twice their actual size. Only fragments of the outside borders of most of the notes were visible. Approximately one-third of the reverse side of the top $1,000 note was visible, substantially obscured by the overlaid money clip. The illustration pertained to a story about "America's Invisible Rich" appearing within the magazine. About nine months after publication, a Secret Service agent telephoned Time's legal department to inform it that the illustration violated §§474 and 504, which barred any color likeness, and that he had been instructed to give Time a " 'slap on the wrist.' "

6. The February 16, 1981 front cover of *Sports Illustrated* sported a photographic reproduction in color of $100 federal reserve notes pouring into and stuffed inside a basketball hoop and attached net. The notes were reduced to approximately one-third actual size, and each was visible only in part; most were substantially obscured by overlaid portions of other notes, by the basketball hoop or net, or by an overlaid printed caption, "Anatomy of a Scandal." The illustration related to a story in the magazine about a "point-shaving" scheme in amateur basketball. On May 18, 1981 a Secret Service agent informed Time's legal department that the illustration violated § 474 and that it would be necessary for the Service to seize all plates and materials used in connection with the production of that cover. The agent requested the names and addresses of all the printers who prepared the cover and further requested an "interview" with a member of Time's management, with counsel present if so desired. The agent stated that the statutory prohibition against publication of currency illustrations aimed to forestall the possibility that a printer involved in the process of creating the illustrations might conclude that it was easy to copy currency, and thus be inspired to do so for profit.

On occasion the Secret Service advised plaintiff to alter illustrations it intended to use.

1. The September 10, 1965 front cover of *Time* ultimately carried a painted portrait of Secretary of the Treasury Henry Fowler with an artist's black-and-white rendering of a $10 bill. Time had originally planned to use a color painting of a furled $10 federal reserve note on which the portrait of Alexander Hamilton, the legend, "United States of America," and the arabic numeral "10" would have been visible. However, when Time sought the views of the Secret Service as to the lawfulness of the background painting, it was advised that it was illegal, and the illustration was changed.

2. The July, 1977 issue of *Fortune* displayed a photographic reproduction of several rows of United States coins receding into the background, where three open doors stood in the dark sky. *Fortune's* editors had originally intended to use three $100 bills as a landscape set beneath the three open doors. Each of the bills was significantly enlarged, shown only in part, and distorted in color, shape, and size. When the legal department of Time sought the views of the Secret Service, it was told that the intended illustration was illegal.

To the editors of plaintiff's magazines the use of illustrations of money as symbols is important in reporting news, in analyzing for their readers complex financial and economic concepts, and in facilitating commentary on national and world affairs.

V.

The sixth paragraph of § 474 certainly reaches all and any likenesses of United States currency. By its terms it prohibits the printing of any "engraving, photograph, print, or impression" in the likeness of any portion of any specimen of United States currency. Thus it does not matter whether the likeness is good or bad, true to size or distorted, faithful to the true color or discolored, printed on paper similar to currency or impressed

on waxpaper. Any likeness of any part of United States currency, whether or not capable of deceiving anyone, or whether or not intended to express an abstract idea, is banned by the language of the provision. The print of a drawing of the corner of a ten dollar bill is prohibited. A button showing the pyramid on the back of a one dollar bill is prohibited. A 3-foot by 2-foot blow-up of a twenty dollar bill with substituted numbers and language is prohibited.[8] A painting of the back of a one thousand dollar bill covering the wall of a barn is prohibited. A print of a fingernail charcoal sketch of the name of the United States of America as it appears on a twenty dollar bill is prohibited. An engraving of the legend, "In God We Trust," found on the back of a ten dollar bill, is prohibited. A plastic impression of a dollar bill is prohibited.

The sixth paragraph of § 474 does not by its terms require intent to defraud, to deceive, to counterfeit. One violates the law simply by creating, executing, selling or bringing into the United States any kind of likeness of United States currency or any part thereof, whether or not the likeness is such that it might assist a counterfeiter in the reproduction of fraudulent notes or deceive a person into accepting such notes as legal tender for a debt.

Section 504 provides exemptions from the total ban imposed by the sixth paragraph of § 474. It permits the printing or publishing of "illustrations" of United States currency which meet *all* of the following requirements: (a) they must be in black and white; (b) they must be "of a size less than three-fourths or more than one and one-half, in linear dimension, of each part of any matter so illustrated"; (c) they must appear "in articles, books, journals, newspapers, or albums"; and (d) they must be for ". . . philatelic, numismatic, educational, historical, or newsworthy purposes." The word "illustration" does not appear in § 474. Neither § 504 nor any other provision of applicable law contains any definition of "illustra-

[8] *See Wagner* v. *Simon*, 412 F.Supp. 426 (W.D. Mo. 1974), *affirmed*, 534 F.2d 833 (8th Cir. 1976).

tion" or of "philatelic, numismatic, educational, historical, or newsworthy purposes."

The Treasury Department, which through the Secret Service is primarily responsible for the enforcement of the counterfeiting laws, requires in addition that an illustration otherwise permitted by § 504 "be accompanied by numismatic, educational historical or newsworthy information relating directly to the item that is illustrated."[9] The Treasury Department has also taken the position that § 504 does not exempt illustrations which are "used primarily for decorative or eye-catching purposes."

VI.

"[C]oncrete legal issues, presented in actual cases, not abstractions" are an absolute requisite for adjudication of legal disputes. *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 423 (1940). *See also Golden* v. *Zwickler*, 394 U.S. 103, 110 (1969); *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U.S. 419, 443 (1938).

Although 28 U.S.C. § 2201 authorizes the court to declare the rights of the parties before it, the statute permits no relief which is not "consonant with the exercise of the judicial function in the determination of controversies to which under the Constitution the judicial power extends." *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240 (1937). "Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient

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[9] Paragraph 14 of defendants' amended answer reads in part as follows:

> . . . Defendants admit that in the opinion of the Department of the Treasury section 504 prohibits illustrations used primarily for decorative or eye-catching purposes and also requires that an illustration permitted by the section be accompanied by numismatic, educational, historical or newsworthy information relating directly to the item that is illustrated.

immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941).

Thus the initial inquiry is whether there exists a justiciable controversy sufficient to support the jurisdiction of a federal court. U.S. Const. art. III, §2.[10]

The Government asserts an absence of justiciability because plaintiff has not been arrested and prosecuted under the statutes. The gist of its argument is that a finding of justiciability may not be predicated upon a pattern of warnings: only an actual prosecution creates an Article III controversy.

This is not the law. "[I]t is not necessary that [plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Steffel* v. *Thompson*, 415 U.S. 452, 459 (1974). Justiciability exists where plaintiff's "challenge is to those specific provisions of [federal] law which have provided the basis for threats of criminal prosecution . . ." *Id.* "[Plaintiff] should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Doe* v. *Bolton*, 410 U.S. 179, 188 (1973).[11]

Plaintiff as a magazine publisher claims First Amendment protection for its use of illustrations of currency for symbolic purposes in connection with articles it has published and

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[10] Article III, § 2 of the Constitution provides in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . —to Controversies to which the United States shall be a Party; . . .

[11] In *Doe* v. *Bolton*, the Court held that where physicians licensed by the state who are consulted by pregnant women attack the constitutionality of a "recent and not moribund" state abortion statute which is the successor to another abortion statute under which physicians were prosecuted, they have standing to challenge the statute and a justiciable controversy is presented. 410 U.S. at 188-189.

intends to publish in the future in its various magazines. The provisions of the sixth paragraph of § 474, and of § 504, read together, proscribe the creation or publication of such illustrations: by the very terms of those provisions the creation of illustrations such as those already published by plaintiff constitutes a federal offense, regardless of intent or malice. Defendants certainly regard illustrations of United States currency already used by plaintiff as contravening the statutory prohibitions, and have repeatedly warned plaintiff of its criminal transgressions. Plaintiff has been told that if it does not cease and desist "from the use of any future reproductions of currency appearing in color," the matter will be turned over to the United States Attorney for "appropriate action."[12] There have

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[12] Letter to associate counsel of plaintiff from assistant legal counsel of the Secret Service, dated November 18, 1976:

> We are again advising Time, Incorporated to cease and desist from the use of any future reproductions of currency appearing in color or for advertising purposes. If Time, Incorporated fails to comply with this request, we will refer the matter to the United States Attorney's office in the Southern District of New York for appropriate action.

This element of threatened prosecution is what distinguishes this case from *Poe* v. *Ullman*, 367 U.S. 497 (1961). In *Poe* v. *Ullman*, Connecticut statutes enacted in 1879 prohibited the use of contraceptive devices and the dispensation of medical advice concerning that use. There had been only one prosecution thereunder, a test case in 1940 to determine constitutionality. Plaintiffs in *Poe* sued for declaratory judgments, challenging the statutes on Fourteenth Amendment grounds. The Court found no justiciable controversy because there was no threat of prosecution:

> "The party who invokes the power [to annul legislation on grounds of its unconstitutionality] must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement . . ."

367 U.S. at 504-505, quoting from *Massachusetts* v. *Mellon*, 262 U.S. 447, 488 (1923). There was no allegation, explicit or implicit, that appellee Ullman threatened to prosecute plaintiffs under the statutes. 367 U.S. at 501.

This case is in a different factual posture than *Poe* v. *Ullman*. There have been many warnings emanating from the Treasury Department over the years, which are discussed in the text at pp. 10-16, *supra*. There have also been various criminal prosecutions under § 474, *see* fn. 13, *infra*.

been relatively recent court cases involving violations of the sixth paragraph of § 474, although only one of them entailed a constitutional challenge analogous to that proffered by plaintiff in this case.[13]

The absence to date of prosecutorial action with respect to plaintiff does not diminish or lessen the immediacy and ripeness of this controversy: "[c]ontingency of official enforcement of clearly applicable criminal prohibitions should not be grounds for denying present review, even if there is no demonstrated threat of prosecution." 13 *Wright, Miller & Cooper, Federal Practice and Procedure:* Jurisdiction § 3532 at 247 (1975). The warnings emanating from the Treasury Department have been

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[13] *Wagner* v. *Simon*, 412 F.Supp. 426 (W.D. Mo. 1974), *aff'd*, 534 F.2d 833 (8th Cir. 1976). *See* discussion, *infra*, on pp. 36-37.

In *Wholesale Vendors of Texas, Inc.* v. *United States*, 361 F.Supp. 1045 (N.D. Tex.), *aff'd mem.*, 486 F.2d 1402 (5th Cir. 1973), a manufacturer of novelty items sold through vending machines sought a judgment declaring, *inter alia*, its right to manufacture "play money" seized from its premises by agents of the Secret Service. The district court denied the request, stating its unwillingness "to hold that the Treasury and Secret Service agents were without authority to seize and retain the [likenesses] in question." 361 F.Supp. at 1048. The plaintiff had received conflicting information from various officers of the Department of Treasury. No First Amendment interest was asserted and no constitutional question was decided.

In *Koran* v. *United States*, 408 F.2d 1321 (5th Cir. 1969), *cert. denied*, 402 U.S. 948 (1971), defendant was convicted for the unlawful possession of a one-dollar silver certificate under the fifth paragraph and for unlawful printing of the certificate under the sixth paragraph of § 474. Defendant had discussed plans to print a large quantity of counterfeit currency with a government informer which led to his investigation and arrest by the Secret Service. The case involved a Fourth Amendment claim; no First Amendment interest was asserted nor did the Court of Appeals mention that issue.

In *Webb* v. *United States*, 216 F.2d 151 (6th Cir. 1954), the Court of Appeals affirmed the conviction under the sixth paragraph of § 474 of two people engaged in a confidence game which included an effort to defraud the victim through the use of crudely counterfeited money. The likenesses were executed with the intent to commit a crime. The constitutionality of § 474 was not mentioned, and no First Amendment claim was asserted.

over a period of at least ten years. The United States Attorney has never disavowed the possibility of prosecution.[14] Despite the lack of a federal indictment, "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co.* v. *Pacific Coal & Oil Co., supra,* 312 U.S. at 273. The matter before me is ripe for Article III adjudication.

VII.

As a threshold matter, I consider 1) whether plaintiff's use of illustrations of money in various contexts constitutes in its content speech which is protected by the First Amendment,[15] and 2) the nature of the statutory provisions which are challenged.

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[14] It is instructive to note the posture of plaintiffs in *United States Postal Service* v. *Council of Greenburgh Civic Associations,* 453 U.S. 114 (1981). The civic associations there filed suit for declaratory and injunctive relief upon receiving advice from the Postmaster in White Plains, New York, that continuation of their practice of using letter boxes for the delivery of unstamped notices could result in a fine up to $300. There is no indication that any member of the civic organizations had any contact with the Justice Department or any other law enforcement agency respecting their alleged violations of the postal statute. While a court may, *sua sponte,* raise the question of subject matter jurisdiction, neither the district judge, nor the Court of Appeals, nor any of the five justices of the United States Supreme Court who wrote opinions in the case voiced any question as to the justiciability of the matter.

[15] When a court is asked to determine whether a species of speech is covered by the First Amendment, it must look to the content of the expression. *See Central Hudson Gas & Electric Corp.* v. *Public Service Commission,* 447 U.S. 557, 561 (1980) (commercial speech); *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323, 340 (1974) (libel); *Miller* v. *California,* 413 U.S. 15, 23 (1973) (obscenity); *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 571-572 (1942) (fighting words).

1. Plaintiff's illustrations of money as protected speech.

The illustrations reviewed in the earlier portion of this opinion make it clear that plaintiff used illustrations of money symbolically—to dramatize or illustrate a set of facts, an existing condition, a moral crisis, a course of conduct. "A picture," it has been said, "is worth a thousand words." Certainly the use by plaintiff of illustrations of money in connection with its various magazine articles gave emphasis, thrust, and even poignancy to the messages of the articles to which the illustrations pertained. A dollar bill worth seventy-three cents, with George Washington shedding a tear, constituted graphic editorial commentary on the ravages of inflation; a hoop and net stuffed to overflowing with hundred dollar bills was a powerful statement of the impact of gambling on the sport of basketball. The image of money is a powerful, expressive symbol, of significant value to members of the press, including plaintiff, in communicating information and ideas on a wide range of issues of vital public interest.[16] It is, to state the obvious, a particularly effective symbol for the communication of ideas about money itself. The economy, inflation, money supply, foreign trade imbalances, interest rates, and national deficit have all been part of the stuff of analytical and interpretive news reporting in recent years—reporting which has driven home to the individual citizen the impact of these matters on his or her daily life. To the extent that illustrations of money as symbols, used in connection with newspaper and magazine reporting on such matters, have explicated or made more comprehensible the very complicated concepts being treated, to that extent the public has been well served.

Since the use of the symbol of money by plaintiff has been, and will continue to be, intimately related to the expression and communication of ideas, I find that the publication or printing of illustrations of United States currency by plaintiff is protected

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[16] "Because appellants' claims are rooted in the First Amendment, they are entitled to rely on the impact of the ordinance on the expressive activities of others as well as their own." *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981).

speech under The First Amendment. It does not entail expression which is deemed by the nature of its content to be subject to regulation in the interests of the public weal. Publishing illustrations of currency does not involve speech characterized by the Supreme Court as posing a "clear and present danger," *Schenck* v. *United States*, 249 U.S. 47 (1919), as "fighting words," *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942), as "defamation," *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), as "obscenity," *Miller* v. *California*, 413 U.S. 15 (1973), as "libel," *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), or as "commercial speech," *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

Thus absent constitutionally permissible overriding considerations, plaintiff has a First Amendment right to publish or print illustrations of United States currency.

2. The nature of the challenged statutory provisions.

The sixth paragraph of § 474 prescribes a comprehensive ban on all likenesses of United States currency. It is triggered by the unauthorized presence of an illustration of money, as symbol or otherwise, and it purports totally to remove that illustration from the national discourse. It is a subject matter regulation.

Section 504 is a content-based measure which would allow certain illustrations of money ("black and white" and "less than three-fourths or more than one and one-half, in linear dimension, of each part of any matter so illustrated") to appear in certain forums ("articles, books, journals, newspapers, or albums"), provided that they were created for a particular purpose ("philatelic, numismatic, educational, historical, or newsworthy"). The statute necessarily vests officers of the executive branch with power to determine the content and purpose of the illustrations. No guiding definitions are set out as to what constitutes an illustration or a philatelic, numismatic, educational, historical, or newsworthy purpose.

In summary, the sixth paragraph of § 474 targets one particular set of illustrations (illustrations of money) for proscription while § 504 is a line-drawing regulation involving the discretion of government officials with respect to content, purpose, and location in determining the availability of exemptions from that proscription.

VIII.

The determination of the nature of plaintiff's speech and of the challenged statutes aids in ascertaining the applicable legal principles developed over the years in First Amendment law.[17] If speech is protected by the First Amendment, a statute which impinges upon that speech must be narrowly drawn so as to be an efficacious means of achieving permissible objectives of the government. *See*, e.g., *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam); *Gooding* v. *Wilson*, 405 U.S. 518 (1972); *Shelton* v. *Tucker*, 364 U.S. 479 (1960); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940). The statute must be narrowly aimed at the permissible objectives and it must to the extent possible avoid impinging on protected speech. *Grayned* v. *City of Rockford*, 408 U.S. 104, 116-117 (1972).

"Although [the government] may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion." *Schneider* v. *State*, 308 U.S. 147, 160 (1939). Regulations addressed to legitimate governmental goals cannot "sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP* v. *Alabama*, 377 U.S. 288, 307 (1964). This is the "overbreadth doctrine": a law is void on its face if it "does not aim specifically at evils within the allowable area of [government] control but . . . sweeps within

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[17] *See* A. Cox, *Freedom of Expression* (1981) at 6: "Classification is important . . . because the earlier efforts to bring all first amendment cases under a 'clear and present danger' test have rightly given way to a variety of standards keyed to the character of the restriction."

its ambit other activities that in ordinary circumstances constitute an exercise" of protected rights. *Thornhill* v. *Alabama*, 310 U.S. 88, 97 (1940).

Where a statute impinges upon protected speech, the burden is on the government to establish the validity of its asserted interests. *Schneider* v. *State, supra*, 308 U.S. at 161. The judiciary has an overriding obligation "to assess the substantiality of the justification[s] offered," *Schad* v. *Borough of Mt. Ephraim*, 452, U.S. 61, 69 (1981), and to ensure that the regulation promotes legitimate governmental ends with minimal intrusion on First Amendment freedoms. *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980); *Hynes* v. *Oradell*, 425 U.S. 610 (1976). "The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton* v. *Tucker, supra*, 364 U.S. at 488. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP* v. *Button*, 371 U.S. 415, 438 (1963). *See Keyishian* v. *Board of Regents*, 385 U.S. 589, 604 (1967).

Where the government regulation is aimed at the noncommunicative impact of protected speech and at harm not caused by the ideas or information contained in that speech, the regulation may be upheld so long as it does not *unduly* constrict the flow of information. *See Cox* v. *New Hampshire*, 312 U.S. 569, 574 (1941) [upholding ordinance requiring parade permits where official discretion was limited exclusively to considerations of time, place, and manner: "[T]he question in a particular case is whether [a] control is exerted so as not to *deny* or *unwarrantedly* abridge the right of assembly and the opportunities for the communication of thought . . ." *Id.* (emphasis added)].

Justice Powell's opinion for the Court in *Consolidated Edison* v. *Public Service Commission*, 447 U.S. 530 (1980), sets forth an instructive framework for analysis of the constitutionality of statutes that bear to some degree on speech. In *Consolidated Edison*, the Court struck down an order by the

New York Public Service Commission that prohibited public utilities from including, with monthly bill mailings, inserts which discussed controversial issues of public policy. The order, according to the Court, directly infringed upon freedom of speech protected by the First and Fourteenth Amendments.

Justice Powell's opinion, noting that a restriction which impinges upon speech is not *per se* invalid, emphasizes that the burden to show the constitutionality of such a restriction is on the state. The opinion suggests analysis in terms of whether the restriction is a reasonable time, place or manner restriction, or whether it is a permissible subject matter regulation, or whether it is narrowly crafted to serve a compelling state interest:

> The Commission's ban on bill inserts is not, of course, invalid merely because it imposes a limitation upon speech. (Citation omitted) We must consider whether the State can demonstrate that its regulation is constitutionally permissible. The Commission's arguments require us to consider three theories that might justify the state action. We must determine whether the prohibition is (i) a reasonable time, place, or manner restriction, (ii) a permissible subject-matter regulation, or (iii) a narrowly tailored means of serving a compelling state interest.

Consolidated Edison v. *Public Service Commission, supra,* 447 U.S. at 535.

I turn to such analysis of the challenged provisions.

IX.

Sections 474 and 504 are interrelated in that § 474 imposes a complete bar to the use of illustrations of money, whereas § 504 exempts from that bar illustrations which satisfy certain criteria as to size (less than three-fourths or more than one and one-half the size of currency), color (must be rendered in black and white), forum (must appear in articles, books, journals, newspapers or albums), and purpose (must be for "philatelic, numismatic, educational, historical, or newsworthy" purpose). Section 504 broadly exempts from § 474, without applying the

above criteria, pictures of currency to be used for non-advertising purposes in motion pictures or television.

Because of the interrelationship of Sections 474 and 504, the ultimate constitutional analysis must be directed to the impact of these sections in tandem upon plaintiff's activities—the extent, if any, to which they prevent or deter constitutionally protected activities. Where it is alleged, as plaintiff alleges here, that threatened enforcement of provisions of law infringe upon a protected liberty, "the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed." *Schad* v. *Borough of Mt. Ephraim, supra,* 452 U.S. at 68, citing to *Thomas* v. *Collins,* 323 U.S. 516, 529-530 (1945).

Preliminary analysis of § 474 and § 504 separately will be useful in ultimate determination of their combined impact upon plaintiff's First Amendment rights.

1. Section 474

The sixth paragraph of § 474 does not enunciate a time, place or manner restriction. Time, place, and manner restrictions are geared toward *methods* of speech and seek to accommodate a particular way of expression with the safety or health interests of the community. "[T]he essence of time, place, or manner regulation lies in the recognition that various methods of speech, regardless of their content, may frustrate legitimate governmental goals." *Consolidated Edison* v. *Public Service Commission, supra,* 447 U.S. at 536. *See also Linmark Associates, Inc.* v. *Willingboro,* 431 U.S. 85 (1977) (for sale signs); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, supra* (pharmaceutical advertisements); *Kovacs* v. *Cooper,* 336 U.S. 77 (1949) (sound trucks); *Cox* v. *New Hampshire, supra* (parade permits).[10]

[10] Even if the provision could be construed as a time, place or manner restriction, its concern with the subject matter of speech, i.e., the symbol of money, would violate the traditional rule that to be constitutional, time, place or manner restrictions must be applied to all

As noted in Section VII, *supra*, in proscribing the use of illustrations of money, as symbols or otherwise, the sixth paragraph of § 474 constitutes subject-matter regulation. Subject-matter regulations encounter great difficulty passing constitutional muster in our jurisprudence, and regulations based on subject matter of speech have been approved only in narrow circumstances. Generally, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of the City of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972); *see Cox* v. *Louisiana*, 379 U.S. 536, 580-581 (1965) (opinion of Black, J.). "To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth." *Consolidated Edison* v. *Public Service Commission*, *supra*, 447 U.S. at 538.

In *Greer* v. *Spock*, 424 U.S. 828 (1976), the Supreme Court held that the United States Government could prohibit partisan political speech on a military base even though civilian speakers had been permitted to lecture on other subjects. The exclusion was justified by the historical tradition "of keeping official military activities . . . wholly free of entanglement with partisan political campaigns of any kind." *Id.* at 839. Thus the decision interpreted the public's right of access in light of "the unique character of the Government property upon which the expression is to take place." *Id.* at 842. (Powell, J., concurring).

In *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974) (opinion of Blackmun, J.), a plurality similarly concluded that a city transit system that rented space in its buses for commercial advertisements was not under a duty to provide space for partisan political commercials. The Court gave weight to the city's fear that partisan political ads might jeopardize long-

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speech irrespective of content. *Consolidated Edison* v. *Public Service Commission*, *supra*, 447 U.S. at 536; *Carey* v. *Brown*, 447 U.S. 455, 470 (1980); *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 209 (1975).

term commercial revenue and lead to accusations of favoritism. *Id.* at 304.

Both *Greer* and *Lehman* concerned the relationship of political speech to a particular governmental facility: the Court concluded that partisan political speech posed a danger to the operation of these facilities.

The flat ban on the journalistic or public use of the symbol of money cannot be equated with the *Greer* and *Lehman* cases. This case does not concern the availability of a public facility for the exercise of the free speech right by private parties. Time does not seek to use the United States Courthouse in Foley Square as a facility from which to propound its views. The sixth paragraph of § 474 cannot be upheld by reliance upon those cases that rest on the special interests of a government in operating its own property.

The sixth paragraph of § 474 does impinge on plaintiff's freedom of speech, since plaintiff has a protected right to use illustrations of money as symbols in connection with its articles (*See* Section VII, *supra*), and § 474 prohibits such use. Thus the question, as posed by Justice Powell in *Consolidated Edison*, is whether that prohibition is "a narrowly tailored means of serving a compelling state interest." 447 U.S. at 535. This court has an overriding obligation "to assess the substantiality of the justification[s] offered" and to ensure that the regulation promotes legitimate governmental ends with the minimal intrusion of First Amendment freedoms. *Village of Schaumburg* v. *Citizens for a Better Environment, supra*, 444 U.S. at 636; *Schad* v. *Borough of Mt. Ephraim, supra*, 452 U.S. at 69.

The justifications offered by defendants for the prohibitions contained in the sixth paragraph of § 474 are basically twofold. The first justification is that the prohibitions prevent counterfeiting. The second justification is that the prohibitions protect "the value [of] and respect for instruments issued as the official obligations and securities of the United States."

The government has a compelling interest in preventing counterfeiting and thus maintaining the integrity of the nation's

currency system. Is the sixth paragraph of § 474, however, a narrowly tailored means of preventing counterfeiting of United States currency? It casts its net over any and all likenesses of such currency whether or not any given likeness has the capacity to deceive or to act as a vehicle for counterfeiting. Thus it is overbroad. *Thornhill* v. *Alabama, supra,* 310 U.S. at 97. Where protected speech, namely the publication of illustrations of United States currency, is involved, the law must be drawn with "narrow specificity" so as to avoid any unnecessary infringement on that speech. *NAACP* v. *Button, supra,* 371 U.S. at 433.

That requirement is not satisfied by § 474's proscription of *all* likenesses. Neither the illustrations of money used by plaintiff nor the plates used to print those illustrations can be used to counterfeit money, or as counterfeit money.[19] To criminalize illustrations such as those employed by plaintiff that have no utility for fraud or forgery and that cannot be used for counterfeiting, but which do serve as vehicles for artistic or journalistic expression, violates the First Amendment by interfering unduly with protected speech. There are less intrusive ways to combat counterfeiting without totally removing illustrations of money from the national discourse.

Defendants' second justification for the § 474 prohibitions—that they protect the value of and respect for the official obligations of the United States—is quite simply a constitutionally impermissible one. When this justification is analyzed, it can only mean that § 474 bans the use of illustra-

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[19] Plaintiff claims, and defendant denies, that the illustrations cannot be used for counterfeiting or as counterfeit currency. Plaintiff has submitted affidavits to the effect that "the materials used to produce four-color offset magazine covers showing usually distorted illustrations of currency can be of little value to someone attempting to counterfeit a hand-engraved, two-sided dollar bill." (*See* Affidavit of Henry A. Grunwald). Common sense does not permit a contrary conclusion. Defendants do not seriously contend otherwise. Plaintiff has no objection to that part of the statute which requires that materials used to print representations of money be destroyed after their final use.

tions of money because of the ideas such illustrations may symbolically represent. This runs counter to the constitutional doctrine that the government may neither prohibit nor prescribe the form or content of individual expression, absent a compelling state interest. *Police Department of the City of Chicago* v. *Mosley, supra*, 408 U.S. at 95, 98. The government cannot compel or prohibit respect for any symbol or idea in this country. *Stromberg* v. *California*, 283 U.S. 359 (1931) (state prohibition of display of red flag struck down); *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943) (mandatory salute of the American flag invalidated); *Street* v. *New York*, 394 U.S. 576 (1969) (conviction for "disrespectful" language about the flag set aside); *Schacht* v. *United States*, 398 U.S. 58 (1970) (punishment for theatrical use of a uniform which was critical of the Army invalidated). Neither plaintiff nor any citizen can be compelled by the government to pay respect to the dollar. The sixth paragraph of § 474 cannot be justified as protecting, by restraining speech, "the value [of] and respect for" currency issued by the government.[20]

In *Wagner* v. *Simon*, 412 F.Supp. 426 (W.D. Mo. 1974), *aff'd*, 534 F.2d 833 (8th Cir. 1976), plaintiff sought a declaratory judgment that the sixth paragraph of § 474 had been unconstitutionally applied to a 36″ x 15″ reproduction he had made in the likeness of a twenty dollar federal reserve note with substantial modifications. These modifications included, *inter alia*, changing the picture of President Jackson to President Nixon, replacing the words "Federal Reserve Note" with the words "Inflationary Note," substituting "Thirty" for "Twenty", and drawing a teapot in place of the Federal Reserve seal. The finished product was intended as a political statement critical of President Nixon's economic policies and his involvement in the "Watergate" affair.

The district court held that the poster fell within the specific proscriptions of the sixth paragraph of § 474 and that

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[20] This second justification so clearly presents an impermissible state interest that it is not necessary to determine, with respect to it, whether a less intrusive approach would be possible.

the provision was not overbroad. The sixth paragraph of § 474 was, the court held, "aimed only at the suppression of the non-communicative conduct within its scope," and was "an appropriately narrow means of protecting a substantial governmental interest" which did "not necessarily interfere with First Amendment rights." 412 F.Supp. at 432.

Wagner arose in a factual context that distinguishes it from the instant case. First, the plaintiff in *Wagner* wanted to sell his product, a commercial aspect not present here, although Time is in the publishing business for a profit. Second, *Wagner* involved an individual artist; this case involves a plaintiff which is a member of the press and which makes the argument that illustrations of currency are vitally necessary to the dissemination of news. No such argument was asserted in *Wagner*. As Justice Holmes once observed, "[l]aws frequently are enforced which the court recognizes as possibly or probably invalid if attacked by a different interest or in a different way." *Quong Wing* v. *Kirkendall*, 223 U.S. 59, 64 (1912).

In any event, the *Wagner* district court did not engage in the analytical process now called for by *Consolidated Edison, Schad, Grayned* and other free speech/free press cases.[21] It did not examine the statute, assess its justifications, nor probe its nexus to the governmental interest purported to be served by it. It did not even indicate whether Wagner's work had any First Amendment protection. I decline to follow it.

2. Section 504

Although the prohibitions in § 474 do not withstand constitutional scrutiny, it is necessary to examine § 504, since if its provisions permitted what § 474 prohibits, a constitutional confrontation would be avoided.

Insofar as plaintiff's illustrations are concerned, Section 504 leaves in place the § 474 proscriptions, and in the course of various of the warnings with respect to plaintiff's violations of

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[21] Of these cases, only *Grayned* had been decided at the time of the *Wagner* decision.

law, government representatives have invoked § 504 (*see* pp. 10-16, *supra*). Be that as it may, § 504 presents troublesome constitutional problems of its own.

Section 504 allows black and white illustrations of United States currency less than three-fourths or more than one and one-half, in linear dimension, of each part of any matter illustrated, appearing in articles, books, journals, newspapers or albums for philatelic, numismatic, educational, historical or newsworthy purposes. This § 504 draws lines: it is a time, place and manner regulation that creates distinctions among illustrations of currency based on criteria pertaining to content, purpose, and forum in which the illustration appears. Section 504 must meet the constitutional standard for time, place or manner regulations: it is to be applied to all speech irrespective of content. *Consolidated Edison* v. *Public Service Commission, supra,* 447 U.S. at 536; *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205 (1975).

Section 504's concern with "philatelic, numismatic, educational, historical, or newsworthy" purposes is constitutionally impermissible. Governmental action that regulates speech on the basis of its subject matter " 'slip[s] from the neutrality of time, place, and circumstance into a concern about content.' " *Police Department of the City of Chicago* v. *Mosley, supra,* 408 U.S. at 99, quoting Kalven, *The Concept of the Public Forum: Cox v. Louisiana,* 1965 Sup. Ct. Rev. 1, 29. In enforcing § 504, the government decides whether the purpose of the illustration is "philatelic, numismatic, educational, historical or newsworthy" and whether the forum in which it appears is indeed an article, a book, a journal, a newspaper or an album. Such decisions are based on content or subject matter. Succinctly put, § 504 requires judgments about the nature and quality of the message contained in the illustration, about the nature and quality of the article to which the illustration relates, and about the nature of the forum containing the illustration, types of judgment the First Amendment prohibits the government from making. *Cohen* v. *California,* 403 U.S. 15, 24 (1971); *Thornhill* v. *Alabama, supra.*

In *Village of Schaumburg* v. *Citizens for a Better Environment, supra,* a municipal ordinance required charitable organizations which desired to raise money in house-to-house solicitation to demonstrate that at least 75% of the receipts would go to charitable purposes. 444 U.S. at 624. Plaintiff, a charitable organization, sued to invalidate the ordinance on the ground that it was overbroad because it barred advocacy-oriented causes whose receipts of contributions were used for salaries and organizational costs, not charitable purposes.

The United States Supreme Court agreed with plaintiff's contention that the statute bore little relation to its goal of preventing fraud or crime and constituted too great an intrusion on plaintiff's free speech right. 444 U.S. at 636. The 75% requirement was perceived to bear heavily on freedom of speech and could only be countenanced if it enjoyed a significant relationship to substantial governmental interests. *Id.* Finding these interests substantial, the Court nonetheless found that they were only peripherally served by the ordinance and could be served by a more narrowly drawn law. *Id.*

Village of Schaumburg demands a tight nexus between the requirements of a statute and the promotion of the governmental goals, especially where a constitutional right is implicated. *Id.* at 639. Such a nexus is missing here. There is no relationship between the distinctions among the purposes and forums, and the evils that the statute purportedly targets. Will an illustration in a numismatic journal be any less susceptible to forgery than one appearing in *Playboy?* Will a newsworthy illustration of money in a book be any less susceptible to forgery than a non-newsworthy item? Indeed, the newsworthiness of an illustration has no bearing on its capacity (or lack thereof) to deceive a person or to facilitate a criminal's attempt at forgery. Neither the purpose to which an illustration is put nor the forum in which it appears has any relation to the prevention of counterfeiting. The federal statutory scheme evidenced in § 504 is insufficiently related to the governmental interests it seeks to promote to justify intrusion on protected speech.

Just as an organization which spends more than 25% of its receipts for non-charitable purposes is no more likely to commit fraud or crime than an organization spending less than 25% of its receipts for non-charitable purposes, the illustrations banned by the provisions under challenge here are no more likely to threaten the public welfare than those arbitrarily allowed. As a charity's ability to fulfill the 75% requirement bears no relationship to the likelihood of its solicitors to commit fraud or crime, the newsworthiness or educational value of an illustration, or the forum in which it appears, has little to do with its capacity to defraud the public.

As an exception to the absolute prohibitions of § 474, the lines drawn by § 504 do not directly promote the government's interest in preventing counterfeiting through the least restrictive means, and they intrude unnecessarily upon plaintiff's freedom of speech. *Shelton* v. *Tucker, supra,* 364 U.S. at 488.[22]

Hynes v. *Oradell, supra,* teaches that a law which fails to inform the public how to conform, and which fails to provide narrow, specific standards for those officials who must apply it, is void for vagueness. 425 U.S. at 622. Thus there is also a problem of vagueness with § 504. The determination of what is "philatelic, numismatic, educational, historical, or newsworthy" is rife with assumption and open to varying interpretation. The definition of a journal, newspaper or album is anyone's game to play. It has been long recognized that time, place, and manner regulations which vest in law enforcement authorities the capacity for discretionary enforcement or subjective definition

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[22] Section 504 also suffers from both under-inclusiveness and over-inclusiveness. It is under-inclusive in that it exempts the broadcast media. It is over-inclusive in that its prohibition bans the finished product irrespective of its ability to perpetrate fraud or crime as well as the plates and the negatives, more likely raw materials for counterfeiting currency. This under- and over-inclusivity indicates a failure to be "a narrowly tailored means of serving a compelling state interest." *Consolidated Edison* v. *Public Service Commission, supra,* 447 U.S. at 535.

of an offense are instruments for censorship.[23] *Lovell* v. *Griffin*, 303 U.S. 444, 452 (1938); *Heffron* v. *ISKCON*, 452 U.S. 640 (1981).

The distinctions drawn by § 504 do not clearly delineate the area of forbidden conduct, which forces the public to guess at its essential meaning in violation of due process of law. *Cramp* v. *Board of Public Instruction*, 368 U.S. 278 (1961); *Hynes* v. *Mayor of Oradell*, *supra*, 425 U.S. at 620. This operates to produce a chilling effect on speech, a vice condemned by the First Amendment. *Smith* v. *California*, 361 U.S. 147 (1959); *Gooding* v. *Wilson*, *supra*.

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[23] The vice of vagueness is starkly illustrated by the two additional requirements which have been communicated to plaintiff by agents of the Treasury Department. *See* fn. 9, *supra*.

Not only must an illustration meet each and every one of the criteria set out in Section 504: it must also "be accompanied by numismatic, educational, historical, or newsworthy information relating directly to the item that is illustrated." This requirement shrinks Section 504's exceptions from Section 474's prohibitions to the vanishing point: even if an illustration were to meet all of Section 504's criteria, it would still be illegal if it did not relate to the specific piece of currency so illustrated. Not only does that additional requirement have no bearing on the asserted goal of preventing forgery but it also represents a Governmental attempt to dictate the contents of a message, implicating immediate and close constitutional scrutiny. *See Shelton* v. *Tucker*, *supra*.

The second requirement put forth by Treasury insists that "decorative or eye-catching" illustrations are not allowed. A front cover illustration that meets all § 504 criteria but is eye-catching would be banned. The questions to ask are: what is "eye catching"? Who determines that issue? What does "eye-catching" have to do with the prevention of forgery?

Section 504 by its terms does not require that illustrations be accompanied by information relating to the item illustrated, nor does it require that the illustration not be eye-catching. The Treasury Department's position, thus, highlights the variance to which interpretation of the law is subject. The absurdity is compounded by the fact that there are very few currency notes in or out of circulation that would provide the basis for a news story.

X.

The original version of the sixth paragraph of § 474 was drafted in 1864 as a financial measure to assure the availability of funds for the War Between the States. In the meantime, technology has come a long way and this case represents a clash between an old law and the needs of modern society. Nowadays, if someone is going to counterfeit money, he or she has far more efficient and direct ways of doing the job than relying on Time's illustrations, all of which are distorted.

There is no material issue of fact. I find that the sixth paragraph of 18 U.S.C. § 474, and 18 U.S.C. § 504, are unconstitutional on their face and as applied to plaintiff. Plaintiff is entitled to judgment as a matter of law on its motion for summary judgment. Defendant's cross-motion for summary judgment is denied. A declaratory judgment to that effect shall be entered.[24]

Submit judgment.

/s/ VINCENT L. BRODERICK

Vincent L. Broderick, U.S.D.J.

Dated: New York, New York
June 4, 1982

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[24] Since a declaratory judgment is to be entered, and defendants will be bound by that judgment, I see no reason to enjoin defendants. *Poe* v. *Gerstein*, 417 U.S. 281 (1974); *Roe* v. *Wade*, 410 U.S. 113, 166 (1973); *Dombrowski* v. *Pfister*, 380 U.S. 479, 484-485 (1965).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TIME INCORPORATED,

Plaintiff,

v.

DONALD T. REGAN, Secretary of the Treasury, H. STUART KNIGHT, Director, United States Secret Service, WILLIAM FRENCH SMITH, Attorney General of the United States, JAMES R. D'AMELIO, Special Agent in Charge, New York Field Office, United States Secret Service, JOHN S. MARTIN, JR., United States Attorney for the Southern District of New York,

Defendants.

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81 Civ. 3218 (VLB)

ORDER AND JUDGMENT

(Filed June 18, 1982)

Plaintiff Time Incorporated having commenced an action for (1) a judgment pursuant to 28 U.S.C. §§ 2201 *et seq.* declaring that Tit. 18, U.S.C. § 474 ¶ 6 (1976) and Tit. 18, U.S.C. § 504 (1976) are unconstitutional and null and void on their face and as applied to plaintiff in that they are overbroad,

impermissibly infringe constitutionally secured freedoms of speech and of the press, are impermissibly vague, and impermissibly distinguish lawful from unlawful speech on grounds prohibited by the First and Fourteenth Amendments of the United States Constitution, and for (2) a permanent injunction pursuant to Fed. R. Civ. P. 65 restraining and enjoining defendants, their agents, and all persons subject to their direction and control from enforcing or threatening to enforce said statutes; and plaintiff and defendants having cross-moved this Court for summary judgment pursuant to Fed. R. Civ. P. 56, and after due deliberation thereon and upon the opinion of this Court dated June 4, 1982, it is

ORDERED that plaintiff is entitled to judgment as a matter of law and plaintiff's motion for summary judgment is granted, and defendants' motion for summary judgment is denied, and it is further

ORDERED, ADJUDGED AND DECREED that the sixth paragraph of 18 U.S.C. § 474 (1976), and 18 U.S.C. § 504 (1976), are unconstitutional on their face and as applied to plaintiff, Time Incorporated, Time & Life Building, Rockefeller Center, New York, N. Y. 10020, and it is further

ORDERED that plaintiff shall recover costs and disbursements from defendants in an amount to be taxed by the Clerk of this Court.

Dated: New York, N. Y.,
June 16, 1982.

/s/ VINCENT L. BRODERICK
U.S.D.J.

SUPREME COURT OF THE UNITED STATES

No. 82-729

DONALD T. REGAN, SECRETARY OF THE TREASURY, *Et Al.*,

Appellants.

v.

TIME INCORPORATED.

APPEAL from the United States District Court for the Southern District of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted.

February 22, 1983

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